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BERKS COUNTY LAW JOURNAL

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VOL. XI

CONTAINING CASES DECIDED BY THE

Courts of Berks County Pennsylvania

REPORTED BY
RANDOLPH STAUFFER
AND
WELLINGTON M. BERTOLET
MEMBERS OF THE BERKS COUNTY BAR

521 COURT STREET, READING, PA.
OCTOBER 1st, 1919

JUDGES
OF THE
COURTS OF BERKS COUNTY

During the period of these reports.

COURT OF COMMON PLEAS

GUSTAV A. ENDLICH..... President Judge
GEORGE W. WAGNER Judge

ORPHANS' COURT

HARRY D. SCHAEFFER President Judge

District Court of the United States for the Eastern District of
Pennsylvania.

SAMUEL E. BERTOLET, Referee in Bankruptcy.

OCT 19 1920

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No 1.

BOYD'S ESTATE.

Decedents' Estates—Widows Election to Take Against the Will—Act 21, April 1911, PL 79.

The mere fact that there may have been undue delay by a widow in electing to take against her husband's will, does not forfeit the right. Where the settlement of an estate has not been delayed or interfered with, and no intervening rights, which may have accrued, will be disturbed, and no injury will result to the parties interested in the estate, mere lapse of time will not deprive the widow of her right to election.

Decedents' Estates—Direction to Pay a Specific Debt—Devises.

Where a decedent gives his whole estate to his wife, and also directs, "the amount owed by me to my mother, Emma R. Boyd, must first be paid, if any of the said amount remains unpaid at the time of my death," the language is not definite enough to inform the devisee what amount she would have to pay, if she would accept the devise. Under these circumstances, the mere fact that considerable time elapsed before the election was made, does not prevent or estop the widow from electing to take against the will.

One is not bound to elect until he is fully informed of the relative value of the things he is to choose between; and if he makes an election before the circumstances necessary to a judicious and discriminating choice are ascertained, he will not be bound.

In the Orphans' Court of Berks County.

Exceptions: Of Emma R. Boyd to the widow's appraisalment under the Act of April 1st, 1909.

Opinion by Schaeffer, P. J., September 28, 1918.—Guy M. Boyd, a resident of the City of Reading, died on December 13th, 1915, leaving his last will and testament, wherein he gave his whole estate to his wife Dora Boyd, and also directed, "She to pay all just claims and bills held against me. The amount owed by me to my mother, Emma R. Boyd, must first be paid if any of the said amount remains unpaid at the time of my death." Letters of administration c. t. a., were granted to Dora Boyd, the decedent's widow on October 3d, 1916. On February 2d, 1917, Emma R. Boyd, the exceptant, brought suit in the Court of Common Pleas against Dora Boyd as administratrix and individually; and on April 11th, 1918, she recovered a verdict against Dora Boyd, as administratrix, for the sum of \$3,225. On April 19th, 1918, Dora Boyd, the widow, filed her election to take against the will of her hus-

band, the decedent, claiming the widow's exemption of \$300, and also \$5,000 under the Act of 1909 and its supplements. Appraisements setting apart the widow's exemptions were made and filed, whereupon exceptions were filed by Emma Boyd, the mother of the decedent.

In the \$300 appraisalment, appears an item, "cash \$112.25," and in the \$5,000 appraisalment there is an item, "cash from Rajah Temple balance \$398.15." These items are excepted to on the ground that the money included in them, is the property of Emma R. Boyd, the exceptant. Counsel for the widow has asked, that since there is a dispute as to ownership of this particular money, these items might be eliminated from the appraisalment, and the same confirmed accordingly. This is to be done without prejudice to the widow, to contest the allegations set forth in the exception, in a proceeding to establish the ownership of the money. The second and third exceptions to the \$5,000 appraisalment are as follows:

"2. The election to retain real estate of the said Guy M. Boyd, situate on the northeast corner of Sixteenth and Haak streets, in the City of Reading, and its appraisalment thereof, are excepted to for the following reasons, to wit: exceptant is a creditor of the said Guy M. Boyd in the sum of \$3,000, with interest from October 6th, 1915, and brought suit in the Court of Common Pleas of Berks County, to No. 85 February Term, 1917, and on April 11th, 1918, recovered a verdict against the said Dora Boyd, administratrix c. t. a., of Guy M. Boyd, deceased, in the sum of \$3,225. This verdict remains unsatisfied.

"That said Guy M. Boyd left his last will and testament, a copy of which is hereto attached, marked Exhibit A, wherein he gave all his property, real and personal to his wife, Dora Boyd, and directed that she pay all just claims and bills held against him, and specifically directed that 'the amount owed by me to my mother, Emma R. Boyd, must first be paid, if any of the said amount remains unpaid at the time of my death.' That said will was duly presented by the said Dora Boyd for probate to the Register of Wills of Berks County, on October 3d, 1916, and for letters of administration cum testamento annexo, copy of her said petition being hereto attached, marked Exhibit B. That letters of administration cum testamento annexo of said Guy M. Boyd, deceased, were granted to her, the said Dora Boyd, who thereupon qualified as such administratrix, a copy of her affidavit being hereto attached, marked Exhibit C, the will remaining of record in the office of the Register of Wills of Berks County, in Will Book No. 29, page 393.

3. That said Dora Boyd, widow of said Guy M. Boyd, deceased, having proved the will of said Guy M. Boyd ac-

cepted letters of administration thereon, qualified as administratrix of his estate, used property which she claimed as belonging to his estate, is estopped from electing to take against the will of her said husband, and particularly against exceptant who proceeded to suit, trial, and a verdict in her favor, on a just claim recognized by the said Guy M. Boyd in his said will, and directed by him in said will to be paid."

These exceptions in substance are, that this appraisal should not be confirmed because the verdict of \$3,225 secured by exceptant remains unsatisfied, and because the widow, by her actions and delay is estopped from claiming against the will at this late date. We will first examine the question, whether there is anything in the law or the facts connected with the settlement of this estate, which prevented the widow from taking against the will at the time she did? It appears that her election in writing was made on April 11th, 1918, one year, six months and eight days after the letters of administration were issued. The Act of April 21st, 1911, P. L. 79, prescribes the procedure to be followed in making an election to take under or against the wills of decedent. This Act of Assembly fixes no time within which the election must be made. It merely provides that where there has been a neglect or refusal to elect within the time prescribed by the order of the Court, that a certified copy of the final decree of the Court shall be recorded. The penalties prescribed in Section 2 and Section 3 of this Act, for not making an election are: the non-participation in the distribution of the estate and fixing of the rights of the parties by the Court where there has been a neglect or refusal to take.

Since the Act specifies no time within which the election must be made, it naturally follows, that the law contemplates that a reasonable time shall be allowed within which this right may be exercised. The mere fact that there may have been undue delay in making an election, does not forfeit the right. Unless parties are injured, mere delay has never been held to deprive a widow of the right of election. And where the settlement of an estate has not been delayed or interfered with, and no intervening rights, which may have accrued, will be disturbed, and no injury will result to the parties interested in the estate, mere lapse of time will not deprive the widow of her right to election. However, if any one is induced to take action toward the estate, either by the conduct or neglect of the surviving spouse to make an election in a reasonable time, such spouse will not be permitted to exercise such right, if by doing so, it would do injustice to the party who acted in pursuance of such conduct or neglect.

The exceptant contends, that the widow, after taking out letters of administration, evidenced by her actions her

purpose to take under the will; and that she repudiated this action and took against the will, only when she discovered that the verdict of \$3,225 against the estate, would have to be paid by her if she took under the will. There is no evidence to prove that the widow knew or had means of knowing the amount due by the decedent to the mother. It was only after suit was brought on a note, which on its face was barred by the statute of limitations, and a verdict recovered, that the amount of indebtedness became definitely fixed. Up to this time the widow did not know the true value or status of the estate and consequently was not in a position to make an intelligent election. She had the right to know what burdens she was assuming, if she took under the will, and this fact could only be determined in the way it was, namely, by a suit at law. The language of the will, referring to the payment to be made to the mother of "the amount owed by me," can hardly be said, to be definite enough to inform the devisee what amount she would have to pay if she would accept the devise. Under these circumstances, the mere fact that considerable time elapsed before the election was made, does not prevent or estop the widow from making such election: *Anderson's Appeal*, 36 Pa. 476-496; *Boileau's Estate*, 201 Pa. 493. Exceptant also argues, that the widow is estopped, because she took out letters of administration and used the property belonging to the estate. The granting of letters of administration to the widow, does not bar the widow from claiming her rights under the law. The occupancy of the real estate by the widow does not necessarily deprive her of the right to make an election against the will, in view of the developments in this estate. In *Anderson's Appeal*, *supra* 476, the actual leasing of the real estate devised to the widow was in itself not to be regarded as an election by matter in pais. One is not bound to elect until he is fully informed of the relative value of the things he is to choose between; and if he makes an election before the circumstances necessary to a judicious and discriminating choice are ascertained, he will not be bound: *Anderson's Appeal*, *supra*, p. 496.

We think that in view of the facts appearing in this case, the widow had the right to make an election at the time it was made, and consequently in the exercise of this right she can take whatever the law would give her in the case of an intestacy. Exceptant has asked us in case we should determine that the election was valid, to withhold confirmation of the appraisement, because the property included in the appraisement is subject to the lien of a judgment for \$3,225, which remains unpaid. Since the widow takes the property subject to the payment of the debts, we do not see why the appraisement should not be confirmed at once.

To refuse to confirm the appraisement until the judgment is paid, would be unfair to the widow, because we do not know when the judgment creditor will move to collect his judgment, or whether his right to do so will go undisputed. The fact that there are debts does not effect the appraisement, for the widow will take the property covered by the appraisement subject to the liens, if there are any: Gilbert's Estate, 227 Pa. 648.

The exceptions are all dismissed, and the two appraisements, after eliminating the amounts of \$112.25 and \$398.15 therefrom, are confirmed absolutely.

BOLIG'S ESTATE.

Decedents' Estates—Claim for Nursing and Boarding.

Where a claim is made by a son-in-law, against the estate of his mother-in-law, for nursing and boarding decedent, without proof of a contract to pay for same, and it appears that other sons of the decedent had nursed and boarded her without charge for equal periods of time, the presumption is strongly against the existence of any such relation as will justify the inference of an implied contract.

In the Orphans' Court of Berks County.

Adjudication: Claim of Frank H. Kegerise.

George J. Gross for claimant.

H. Robert Mays for accountant.

Opinion by Schaeffer, P. J., September 28, 1918.—Frank H. Kegerise, a son-in-law, presented a claim against the estate, upon a quantum meruit, for nursing and boarding decedent from Aug. 31, 1916, to October 12, 1917, which includes the last illness. The period covered by the claim is four hundred days, and claimant suggests a fair allowance to be \$400, or \$1.00 per day. The objection is, that there was no special contract between the parties.

The Court has no doubt from the testimony presented, that the claimant rendered services. It is also clear that the services were not only continuous for the period claimed, but of an onerous and disagreeable character. When testatrix died, she was seventy years of age, had been blind, and suffering from paresis. As a result of her impaired mental condition, she required constant watching, and being blind, of course, made her utterly helpless without much personal attention to her needs on the part of some one. Besides all this, it was testified by the attending physician that she had lost control of her bowels and bladder; and this added to the

general unpleasantness of the situation for those having charge of her. This testimony is undisputed; and in the Court's mind it leaves no question that to the Kegerise family, in the latter days of her life, testatrix was a great care and burden.

It was also testified, however, that when testatrix took sick in 1916, she happened to be in the Kegerise home as a result of her habit of dividing her time among all of her children. For some years prior to her last illness, her custom had been to visit the homes of her children, remaining with each for periods of more or less duration, and paying nothing for nursing and boarding. John F. Bolig, one of the sons, testified that immediately following his father's death, testatrix had lived with him for over two years; she had also left his home for her last visit to the Kegerise home. Harry and Joseph Bolig, two other sons, testified that during the several years before her death she had also lived in their homes. None of these witnesses charged testatrix anything for her maintenance.

It is owing to this latter state of facts—that at some time or other each of the children maintained their mother without charge—that the objection to this claim arises; and the Court thinks the objection must be sustained on the following language in *Gery vs. Weber, et al.*, 151 Pa. 396:

"The undisputed facts of the case appear to bring it within the principle of *McHenry's Appeal*, 1 Adv. R. 689, in which it was held that a son-in-law cannot recover for nursing, etc., of his mother-in-law where it appears that the decedent, an aged woman, had for years divided her time between her son and daughter, wife of claimant, living with each of them, at stated intervals, as a member of their respective families, without paying or agreeing to pay for such care and attention as her age and the state of her health required. In such cases the presumption is strongly against the existence of any such relation as will justify the inference of any implied contract: *Hauck vs. Hauck*, 99 Pa. 552; *Patton vs. Conn*, 114 Pa. 186."

The claim, therefore, must be disallowed.

HECKMAN vs. HECKMAN.

Judgments—Rule to Open—Lien on Subsequent Indebtedness—Affect on Innocent Third Party—Question for Jury.

1. Whilst as between the original parties a judgment confessed by the one to the other may by their agreement be made to stand for subsequently arising indebtedness, this cannot be done to the prejudice of innocent third parties.

2. Whether or not there has been an agreement by which a third party could be affected, and whether or not the indebtedness represented by the confessed judgment arose from transactions or advances which the judgment was originally intended to stand for are questions for the jury.

In the Court of Common Pleas of Berks County.

No. 54 April Term, 1914, J. D., No. 8 February Term, 1918, E. D.

Rule to open judgment.

Joseph R. Dickinson for Plaintiff and Rule.

W. Kerper Stevens for Defendant.

Opinion by Endlich, P. J., October 7, 1918—In the fall of 1913 the defendant made some alterations to a property then owned by him, for which he needed money. The plaintiff, his brother, agreed to advance what the defendant required, the latter to secure him by confession of a judgment in his favor. The judgment eventually settled upon was for \$2,000, plus \$100 attorney's collection fee, and was accordingly entered for \$2,100 to No. 54 Apr. T., 1914. Partial payments reduced this amount, as plaintiff concedes, to \$2,068.50, (including collection fee), but as defendant insists, to \$1,600. About the time of the confession and entry of the judgment a promissory note for \$2,000 was given by the defendant to the plaintiff for the same debt as the judgment, which note was admittedly reduced by partial payments to \$1,600. That amount was offered to the plaintiff in satisfaction of the judgment, but refused by him. An execution issued by him upon the judgment for \$2,068.50, with interest, was levied on the property referred to. In the meanwhile, on June 17, 1916, that property had been conveyed for a good and valuable consideration to defendant's wife, Daisy Wisser Heckman, and she is now here asking to have the judgment opened in order to ascertain how much is due on the same. Upon her petition this rule was granted. The question in controversy between the parties is whether the judgment stands for \$2,068.50 or only for \$1,600.

As already stated, the reduction of the \$2,000 promissory note to \$1,600 is undisputed. But the plaintiff holds another note originally for \$377.47, now reduced to \$370, first given on Nov. 9, 1916, i. e., subsequently to the above-mentioned conveyance of the property; and it is the contention of the plaintiff that the judgment is to be treated as covering that promissory note, or the indebtedness it represents, as well as the larger one. It admits of no doubt, under *Peirce vs. Black*, 105 Pa. 342; *Bank vs. Mosser*, 161 id. 469; *Weiskircher vs. Volk*, 29 Pa. Super. Ct. 611, and similar cases, that as between the original parties a judgment confessed by the one to the

other may by their agreement be made to stand for subsequently arising indebtedness. But the same cases are authority for holding that this cannot be done to the prejudice of innocent third parties. Whether the \$370 note is covered by the judgment or not would seem to depend upon whether or not there has been an agreement to that purpose by which the petitioner could be affected, or whether or not the indebtedness it represents arose from transactions or advances which the judgment was originally intended to stand for; and these are apparently questions of fact the decision of which is peculiarly within the province of a jury. It follows that this rule should be made absolute and the petitioner given an opportunity to show just what and how much is really due upon the judgment to the plaintiff. The alleged agreement between the defendant and Daisy Wisser Heckman whereby he was to assume the payment of the judgment cannot, of course, be regarded as in any way concerning the plaintiff.

It is needless to discuss the suggestion of irregularities in the conduct of the execution. The main application here is to open the judgment, and the granting of that application necessarily affords all the relief the petitioner seeks in this proceeding.

And now, Oct. 7, 1918, the rule to show cause why the judgment should not be opened is made absolute, and all further proceedings in the cause are stayed until that matter is disposed of.

CALTON MANUFACTURING CO. vs. PROSPECT DYE WORKS.

Affidavits of Defence—Liens—Dyers' Lien—Act 20 May, 1913, P. L. 271.

1. In an action of replevin, the affidavit of defence disclosed that O., being in possession of property belonging to the plaintiff as its bailee, transferred it for a specific purpose to the defendant under an arrangement with defendant making the property liable in defendant's hands to the latter's claims generally against O., and this without the assent or knowledge of the plaintiff, who was a stranger to the transactions between O. and the defendant. **Held:** the affidavit is insufficient to prevent judgment.

2. The Act 20 May, 1913, P. L. 271, in giving dyers a lien for pending accounts seems to have reference to accounts between them and the owner, and to apply only where work, labor or materials were furnished by the dyers in the treatment of the goods for the owners.

In the Court of Common Pleas of Berks County.

No. 58 June Term, 1918.

Rule for judgment of insufficient affidavit of defence.

H. F. Kantner for Plaintiff and Rule.

J. A. Keppleman for Defendant.

Opinion by Endlich, P. J., October 7, 1918.—According to the averments of the plaintiff's declaration in this case, it, during the latter part of 1917, shipped a quantity of unfinished hosiery to one Oaks in the city of Reading with a view to having him dye and finish the same in accordance with the terms of a contract previously entered into between him and the plaintiff, which reserved to the latter all title in the goods, Oaks to be paid a stipulated amount for work actually performed thereon after the completion of the same. Oaks received the shipment, and without the knowledge or consent of the plaintiff delivered a portion of the hosiery to the defendant for the purpose of having it dye the same. The defendant did not do so, indeed performed no work of any kind or character on the hosiery, but held the same from the time of its receipt from Oaks, awaiting further instructions relative thereto from him. A demand upon the defendant by plaintiff for surrender of the hosiery being refused, this action of replevin was instituted by plaintiff to recover it.

The affidavit of defence does not deny these allegations of the declaration, but avers that Oaks represented to the defendant that the hosiery was his property and that the dyeing should be done for and on account of Oaks, with the further understanding that the hosiery should be subject to a general lien in favor of defendant, not only for the dyeing thereof, but also for the amount of former accounts arising in the usual course of business between defendant and Oaks and owing by Oaks to the defendant, which ran up to about \$600.

Because of this alleged lien, the Prospect Dye Works claims the right to hold the hosiery against the plaintiff, its real owner. As was said in *Evans vs. See*, 23 Pa. 88, 91, where a result contended for is contrary to a clear dictate of natural justice, it is needful to look closely into the reasons assigned in support of it. It is undoubtedly true that the dyer who receives goods from their owner under a special contract that they shall be subject to a general lien, not only for the dyeing and finishing thereof, but also for a balance due upon a previous account representing dyeing done in the usual course of business between the parties, may have a lien for the amount of such account on the goods so received, though no work was done upon them: see *Firth & Foster Bros. vs. Hamill*, 167, Pa. 382; *Hecht vs. Dye & Finishing Works*, 66 Pa. Super Ct. 97. But this rule, as appears from the very decisions cited as well as from others, has to do with arrangements of the description indicated made

between the owner and the dyer or by a third person with the owner's knowledge and assent, express or implied; and where made by a third party, unless brought home to the owner in a way warranting an inference of his consent, does not bind him: *Meyers vs. Bratespiece*, 174 Pa. 119. So far as the plaintiff here is concerned, the affidavit of defence (which is made to the declaration: *Ashman vs. Weigley*, 148 Pa. 61, 63; *Wanner vs. Eman. Church*, 174 id. 466, 470), does not set up any assent or knowledge on plaintiff's part in respect to what occurred between Oaks and the defendant Dye Works; and what is not averred in an affidavit of defence is taken not to exist: *Kaufman vs. Iron Co.*, 105 Pa. 537, 542. Hence the principle stated can hardly be looked upon as here controlling. Taking the affidavit and the admitted or undenied averments of the declaration as verity, the situation presented resolves itself into this, that Oaks, being in possession of property belonging to the plaintiff as its bailee, transferred it for a specific purpose to the defendant under an arrangement with defendant making the property liable in defendant's hands to the latter's claims generally against Oaks, and this without the assent or knowledge of the plaintiff, and that the defendant is now seeking to hold on to that property against the plaintiff, with whom it had no dealings or privity, and who is a stranger to the transactions between and the relations of Oaks and the defendant. It may further be noted that the Act 20 May, 1913, P. L. 271, in giving dyers a lien for pending accounts due them seems to have reference to accounts between them and the owners of the goods and owing by such owners, and to apply only where work, labor or materials were furnished by the dyers in the treatment of the goods for the owners. There is no pretence here that the past-due accounts for which a lien is claimed arose from the treatment of goods belonging to plaintiff, and the declaration avers, and the affidavit of defence does not deny, that no work, labor or materials were furnished by defendant in or about the hosiery it insists upon retaining by virtue of its supposed lien. It would appear to follow that the affidavit does not go far enough to prevent summary judgment, and therefore—

The rule to show cause is made absolute.

RANK vs. TOWNSHIP OF ROBESON.

Negligence—Steam Road Roller—Sparks—Fires—Circumstantial Evidence.

In an action for damages for property destroyed by a fire alleged to have been caused by the negligent operation of a steam road roller, the case is for the jury and a verdict for the plaintiff will be sustained where the evidence shows that the road roller was in close proximity to the property destroyed, that the wind was blowing directly towards it, that the roller had no spark arrester, that from 15 to 30 minutes before the fire was discovered the roller started up a hill close by the property, and that there was no other source of explaining the origin of the fire.

In the Court of Common Pleas of Berks County.

No. 38 January Term, 1917.

Trial and verdict for Plaintiff.

Rule for Judgment non obstante veredicto.

Lee Friday and Joseph R. Dickinson for Defendant and Rule.

S. M. Meredith contra.

Opinion by Wagner, J., October 7, 1918—Plaintiff brought this action against the defendant to recover damages on account of the destruction by fire of a combined wagon house, garage and carriage shed, together with the contents thereof, which she alleged was caused by defendant's negligence. The negligence charged is that the defendant in a careless and negligent manner operated its steam road roller which was not equipped with a spark arrester and guard so that sparks of fire and other inflammable material fell upon plaintiff's property setting fire thereto and destroying it.

In the course of the trial three questions arose: (1) whether the steam road roller which was alleged to have caused the fire was at the time in the control and possession of the defendant; (2) whether the fire originated from the steam road roller, and (3) whether defendant was negligent.

At the argument of the case defendant admitted that the question of ownership and control of the road roller was for the jury. It, however, contended that there was no evidence to sustain the jury's affirmative findings on the second and third questions.

The evidence showed that on April 20, 1916, at about 1.30 P. M. the supervisors of the township proceeded with a steam road roller from Joanna Station westward towards Reading. After going westward for about half a mile, they came to a cross road running north and south from Geigertown to Morgantown. The destroyed building was located on the Geigertown road about 30 feet north of the northwest corner of the intersection. When they came to the cross road

they backed the steam roller down alongside of the carriage shed which was the portion of this combined building lying immediately along the Geigertown road. They did this for the purpose of hooking on to the steam road roller a scraper that was lying on a triangular piece of ground immediately to the north of the building. After the scraper was attached to the road roller they then proceeded to the public road from which it had backed and went on towards Reading. Within a quarter to a half an hour after this, fire was discovered on the roof of that portion of the building designated as the carriage shed and was then already in a considerable blaze. The steam road roller was not provided with a spark arrester. Mr. Sanders testified that it backed down along the side of the carriage shed with the hind wheel "right in there at the corner," that it was "partway in the grass, kind of slanting towards the shed." One of defendant's witnesses stated that it was within eight feet of the carriage shed. On that day, as one of the witnesses testified, a fair wind was blowing, or, as Mr. Sanders said, "it was a pretty windy day, the wind was blowing from the east." This he knew because the wind blew the phosphate from the drill which he was following into his face. The Geigertown road from the carriage house to the road leading to Reading had a slight upward grade.

In *Kriebel vs. Worcester Twp.*, 253 Pa. 452, on page 455 it is stated: "Although the absence of a spark arrester is not in itself evidence of negligence, it may be a factor in determining whether or not negligence on the part of the owner of the engine existed under given circumstances."

The question then is whether, in view of the fact that this engine did not have a spark arrester, there was a negligent operation of it in running it on a windy day down right alongside of this building with the wind blowing directly from the engine toward this building; this to be taken in connection with the additional circumstances of running it off of the main road on to the grass, attaching thereto the road scraper, and then proceeding along a slight up grade to the Reading road, thus requiring greater power to propel the road roller and therefore making more probable the emission of sparks from the engine. These combined circumstances were sufficient to sustain the negligence charged against the defendant and to explain the origin of the fire. There is no evidence of any other fire near this place at the time the building was destroyed. Brush had been burned in the orchard at a distance, according to the scale of the draft, of more than 200 feet north of this shed. This had happened earlier in the day and at the time of the burning of the shed was practically extinct. The road roller in this close proximity

to this building, the wind blowing right directly towards it, the extra force required to propel the roller, the well known fact that sparks are emitted from engines: Henderson vs. Phila. Etc. R. Co., 144 Pa. 461-476; Kriebel vs. Worcester Twp., 253 Pa. 452-455; Derminer vs. N. Y. Cent. & Hudson River R. R. Co., 42 Pa. Sup. Ct., 541; the location of the carriage house where the fire originated right at the place where the road roller had been, the discovery of the fire within 15 to 30 minutes after the road roller left—all reasonably point to the conclusion that the burning of the building was caused by sparks of fire emitted from this steam road roller. The fact that no one saw sparks emitted from the road roller does not determine this case against the plaintiff. The time was around 2 o'clock P. M. when "the air may be full of live sparks . . . and yet the eye cannot detect them." John Hancock Ice Co. vs. Perkiomen R. R. Co., 231 Pa. 117-121; Wagener vs. P. & R. R. Co., 235 Pa. 539-562.

The rule for judgment n. o. v. is discharged.

**COMMONWEALTH, for use of JENNIE HAGEMAN vs.
MILTON HAGEMAN, defendant, and BERKS
COUNTY TRUST CO., Garnishee.**

Wills—Gifts—Intention—Vested Gift.

1. A gift of the income of a fund without limitation as to time is a gift in perpetuity, and becomes the fund itself.
2. Where there is no bequest over, and no restriction to the life of the first taker, the gift is absolute.
3. Where it is plain that the intention of the testator was to give the entire beneficial interest of a bequest, the fact that he withheld the enjoyment of the principal until the legatee should demonstrate his ability to accumulate property, in no wise affects the question of intention.
4. Where a testator directs that his estate be divided into five equal shares, giving one of them to each of his four daughters "absolutely" and "to my son Milton one equal fifth part thereof," and then adds, "the four daughters above named shall each receive their share absolutely, the share given to my son Milton shall be given to the Berks County Trust Co., of Reading, Pa., for the purpose of being invested by them, the interest thereof shall be paid annually unto my son Milton, and if, at the expiration of ten years after my decease, he shall be able to demonstrate that he has accumulated, or acquired any property of value, then the principal shall be paid to him absolutely," and there is no bequest over, no restriction of the legacy to the life of Milton, and no limitation as to time, the gift to Milton is vested and, therefore, liable for his debts.

In the Court of Common Pleas of Berks County.

No. 46 December Term, 1917.

Rule for Judgment on Garnishee's Answers.

Caleb J. Bieber for Plaintiff and Rule.

F. A. Marx for Garnishee.

Opinion by Endlich, P. J., October 7, 1918—In the Court of Quarter Sessions of this county, the defendant, Milton Hageman, was ordered to pay a weekly amount for the support of his two children. He failed to keep up the payments until now his arrearages have reached the sum of \$451.50. For that sum, with interest from Nov. 13, 1917, judgment was entered against him to No. 20 Nov. T. 1917, J. D., and thereupon this attachment execution was issued, summoning as garnishee the Berks County Trust Co., which has in its hands the sum of \$525 as principal, and \$24.24 interest thereon, under the will of Joseph H. Hageman, the father of Milton Hageman. There is no dispute as to the liability of the interest to seizure by this process; but its efficacy to take the principal is denied. The question thus presented arises under, and is to be resolved by reference to, the will of Joseph H. Hageman, who died in 1905.

After giving a number of directions and specific bequests, etc., the will disposes, in the 10th paragraph, of "all the rest, residue and remainder" of the testator's estate, dividing it into five equal shares and giving one of them to each of his four daughters "absolutely" and "to my son Milton one equal fifth part thereof," and then adds:

"The four daughters above named shall each receive their shares absolutely. The share given to my son Milton shall be given to the Berks County Trust Co. of Reading, Pa., for the purpose of being invested by them, the interest thereof shall be paid annually unto my son Milton, and if, at the expiration of ten years after my decease, he shall be able to demonstrate that he has accumulated or acquired any property of value, then the principal shall be paid to him absolutely."

There is here first of all an unconditional gift to Milton. If the provision for him stopped with the words "to my son Milton one equal fifth part thereof," there would hardly be any room for doubting that his interest in the share set apart for him was a complete and absolute one. But it is well settled by the decisions: see *Sheets's Est.*, 52 Pa. 257; *Krebs's Est.*, 184 id. 222; *Spring's Est.*, 216 id. 529, that an absolute interest given by a will may be cut down to a qualified one by directions occurring subsequently in the same, which unequivocally show that the testator means the legatee to take a lesser interest only; and it is urged that that is what we have here. The testator expressly declares that the daughters shall receive their shares "absolutely," but in the gift to Milton omits that word and then puts Milton's share in the hands of the Trust Company for the purpose set forth and directs that it shall be paid to him "absolutely" upon the happening of a specified condition, he to receive periodically the income derived from its investment.

It must, however, not be overlooked that there is no bequest over,—no restriction of the legacy to the life of Milton,—no limitation as to time, but a gift of the income in perpetuity,—a plain intent to give the entire beneficial interest in the legacy to Milton, merely postponing his enjoyment of the principal,—an evident hope and expectation that he would be able to accumulate property within the designated period, (there being no provision for any other contingency,)—and the fact that to hold the gift to Milton to be contingent and not vested so far as the principal is concerned, would necessarily treat the testator as having died intestate as to part of his estate in spite of his manifest purpose: see *Boies' Est.*, 177 Pa. 190, 196, to dispose of the whole of it. All of this makes against the conclusion that there is in what follows the direct bequest to Milton a clear intent to give him a less than absolute interest in the principal and seems to require a contrary understanding. Nor is the creation of a trust inconsistent with the bequest of an absolute beneficial estate: *Krebs's Est.*, 184 Pa. 222, 223-4. Indeed, the present case appears to be ruled by *Millard's App.*, 87 Pa. 457, which is substantially as nearly as can be on all fours with it. The provision of the will there in question was this:

"I give . . . to my executrix . . . the sum of \$30,000 in trust that she place the same out at interest . . . and pay over the interest . . . unto my nephew, Joseph M. Millard; and in case the said Joseph M. Millard shall be sober and industrious in his habits my said executrix may, and she is hereby authorized to pay over to him . . . such portions of the principal as she in her judgment shall deem right and proper, or she may at any time . . . pay over to him the whole of said \$30,000."

It was held that this was a vested legacy in the nephew passing to his administrator upon his death, the principles invoked being that a gift of the income of a fund without limitation as to time is a gift in perpetuity and carries the fund itself; that where there is no bequest over and no restriction to the life of the first taker the gift is absolute; and that where it is plain that the intention of the testator was to give the entire beneficial interest of a bequest, the fact that he withheld the enjoyment of the principal as above indicated in no wise affects the question of intention. All this seems to apply directly and almost literally to the present case, which is perhaps stronger in the line of plaintiff's contention than the *Millard* case, because of the gift to Milton preceding the provision postponing his enjoyment of the principal. If, in the *Millard* case, the interest of the legatee was vested, it of course was liable for his debts, and so it must be held here that the principal of Milton's share is liable for his

obligations. Accordingly we feel constrained to decide the question here arising in favor of the plaintiff and against the garnishee.

The rule to show cause is made absolute.

BUCK et al. vs. ZIEMER.

Practice C. P.—Province of the Court and Jury—Verdict Based on Guess or Compromise—New Trial.

1. The Court is always careful to avoid interference with the province of the only tribunal our legal system has provided for the trial of disputed facts, when their action can be attributed to the influence of legal testimony, even by a strained intendment, but where no intendment can sustain a verdict rendered, it must be set aside.

2. Where in the light of the evidence the jury's verdict appears to be a guess or a compromise, it will be set aside and a new trial granted.

In the Court of Common Pleas of Berks County.

No. 8 September Term, 1917.

Trial and verdict for Plaintiffs.

Rule for new trial.

H. F. Heinly for Defendant and Rule.

Lee Friday contra.

Opinion by Endlich, P. J., October 26, 1918—In *Hawman vs. Turnp. Road Co.*, 2 Woodw. 332, at p. 336, Judge Woodward, then presiding over this Court, enunciated the principle, which is really axiomatic, that the Court is always careful to avoid interference with the province of the only tribunal our legal system has provided for the trial of disputed facts, when their action can be attributed to the influence of legal testimony, even by a strained intendment, but that where no intendment can sustain a verdict rendered it must be set aside. The present case, upon a careful review of the record, seems to belong to the latter class.

The defendant leased a portion of his farm to the plaintiffs on shares. Before the expiration of the term fixed by the lease he required them to give up possession to him because, as he conceived and alleges, they were not cultivating or attending to it properly as contemplated by the lease. The plaintiffs in obedience to his demand surrendered the property and brought this action against him to recover damages for breach of contract, the measure of damages being agreed on all hands to be the difference between the

value of the plaintiffs' share of the produce to be realized or expected and the cost of materials and labor already put into and still to be put into its cultivation. The testimony adduced by plaintiffs at the trial but vaguely indicates the possible total quantity and value of the crops. The plaintiffs' counsel, by his interpretation of that testimony, has, as representing the quantity and value in question, reached the figure of \$1,700, the half of which would be plaintiffs' share, to wit, \$850. They offered, however, no proof of the cost of production. Neither was there evidence of any shortcoming by defendant with respect to the cultivation of the land after it came back to him; and on his part there was evidence of the cost of producing the crops, which is really all the evidence on that subject that we have in this case. Of course the plaintiffs are entitled to the benefit of it: *Ins. Co. vs. Gackenbach*, 115 Pa. 492, 499. By it it appears that together with the plaintiffs' share of seed, which defendant furnished or paid for, the cost of production was \$268.78. Deducting this from \$850 would leave a balance in favor of the plaintiffs of \$581.22. This balance is further to be reduced by \$183.88, the amount of a setoff claimed in defendant's affidavit of defence, not denied by any reply of the plaintiffs, and therefore, as is conceded by plaintiffs' counsel, to be taken as admitted and as bound to be allowed by the jury in this case. The deduction of that set-off would result in a balance in favor of plaintiffs or \$397.34. There is, however, on the part of the defendant, positive testimony as to the actual and exact quantum of the crops produced, the value of which, at the figures given in the plaintiffs' evidence, foots up \$785.76, the half thereof being \$392.88. The deduction from this sum of the cost of production, already stated as \$268.78, would leave a balance in favor of the plaintiffs of \$124.10, which, by the set-off or \$183.88, would be converted into a balance due the defendant of \$59.78. The verdict of the jury was for the plaintiffs for the sum of \$248.09, an amount which agrees with neither the plaintiffs' evidence nor that of defendant, and which cannot be reached by any interpretation of the one or the other that has been pointed out to the Court or has suggested itself to the same as reasonable. It thus seems impossible to harmonize the finding of the jury with any aspect of the evidence,—or, in other words, to look upon it as founded upon aught but a guess, which cannot be permitted to control: see *Ry. Co. vs. Taylor*, 104 Pa. 306, 316-7, or a compromise, which is not to be countenanced: see *Sloan vs. Johnson*, 20 Pa. Super. 643, 650. For these reasons, in accordance with the principle above declared,—

The rule to show cause is made absolute.

READING vs. SHENK.

Municipalities—Cities of the Third Class—Liens—Sewers—Sewers Laid on Private Property—Act 30, March, 1903, P. L. 115, sec. 5.

Under sec. 5 of the Act 30, March, 1903, P. L. 115, a city of the third class has the right to construct a sewer along an alley which was never by the city legally laid out, taken over or opened as a public thoroughfare and charge the cost on the abutting property.

In the Court of Common Pleas of Berks County.

No. 226 February Term, 1913.

Sci. fa. on municipal lien.

Trial and verdict for Plaintiff.

Rule for judgment non obstante veredicto.

Caleb J. Bieber and Earle I. Koch for Defendant and Rule.

Wellington M. Bertolet, city solicitor, and Fred A. Marx, assistant city solicitor, contra.

Opinion by Endlich, P. J., October 26, 1918.—There are no disputed facts in this case. The defendant is the owner of a property fronting on Moss street, and in the rear, at a distance of 100 feet from Moss street, abutting on a street or alley known as Clover street or alley, which was never by the city legally laid out, taken over or opened as a public thoroughfare, but has been actually in use at least as a private street or alley. The city laid a branch sewer along this Clover street or alley against the objection of the defendant and has assessed the cost thereof upon his property abutting thereon. A lien was subsequently filed by the city against the defendant's property to No. 2181 Jan. T. 1908, C. L. D., and this sci. fa. was issued upon the same for its collection. The defence is that the city had no legal right to construct the sewer along Clover street or alley and charge the cost upon the defendant's property. That the ground covered by such a street is private property is decided in Harrisburg vs. Brightbill, 6 Distr. R. 438, and is not questioned. That, under the Act 23, May, 1889, P. L. 277, the city had no right to lay a sewer along such a street or alley and charge the cost or any part of it upon the abutting properties is also involved in the case just cited. That, indeed, no such right existed prior to the Act 30, March, 1903, P. L. 115, seems to be conceded. But the Act of 1903, in sec. 5, provides that—

"The councils of any city . . . shall have power, without petition therefor, to construct . . . sewers of all kinds in its public streets, lanes, alleys, highways, and over and across public and private lands or property, and to pay the cost and expense thereof out of the general revenues, or special

funds raised for said purpose, or to assess the same upon abutting property”

The language of this provision as applicable to the present case is very plain and leaves no room for doubting its effect and meaning. *Absoluta sententia expositore non eget*. Accordingly at the close of the trial of this case the Court instructed the jury to render a verdict in favor of the city, and we are constrained to hold that this instruction was not only warranted but required by the Act of 1903 as above quoted. The suggestion that the sewer laid on Clover street is not needed by the defendant inasmuch as there is a sewer along the front of his property, is not found in the affidavit of defence, and hence, under our Rules of Court, is not available as a defence, even if otherwise it might be. It therefore calls for no discussion.

The rule to show cause is discharged.

HODGES vs. FOSS-HUGHES CO.

Contracts—Sale and Purchase—Waiver of Stipulation—Question for Jury.

The requirement in the draft of a contract of sale and purchase that the contract must be signed by an officer or branch manager of the vendor company before becoming a contract binding on the company, being inserted for the protection or benefit of the vendor, may be waived, and the question of waiver is ordinarily one for the jury, being for the Court only where the facts are indisputable and the inference from them one of law.

In the Court of Common Pleas of Berks County.

No. 79 November Term, 1916.

Trial and verdict for Plaintiff.

Rule for new trial and for judgment non obstante verdicto.

Paul Freeman and W. K. Stevens for Defendant and Rules.

John B. Stevens contra.

Opinion by Endlich, P. J., October 26, 1918.—The plaintiff claims that on July 14, 1916, he entered into a contract with the defendant whereby the latter sold to him and he purchased a second-hand automobile which the defendant expected to get in and was to deliver to plaintiff by Aug. 1, 1916. The plaintiff was to pay the defendant \$1,175, of which \$175 were paid to or “deposited” with the defendant at the making of the alleged contract. An inspection of the paper declared

upon and produced as the contract of sale and purchase shows that its own terms required it to be signed by an officer or branch manager of the defendant company before becoming a contract binding on the same, and that this paper was not so signed, though it was signed by a salesman with the permission and in the presence of the branch manager. When Aug. 1 came around the defendant was unable to deliver the car to the plaintiff because it had not come into the defendant's hands, the owner having changed his mind about surrendering the car in part payment of another which he was acquiring. The defendant thereupon notified the plaintiff of its inability to furnish the car, and offered to return the \$175. The plaintiff, not satisfied with that, brought this action against the defendant alleging the breach of its contract and claiming damages therefor. At the trial the defendant objected to the admission in evidence of the alleged contract because not signed by an officer or branch manager of the company. It was considered by the Court that the requirement of such signature might be waived by defendant. The paper was admitted, the question of waiver of the signature or no waiver thereof, and consequently of the status and effect of the paper as a contract or not, being regarded as one for the jury to pass upon, and accordingly submitted to it. The jury found for the plaintiff, and defendant obtained these rules for judgment n. o. v. and for a new trial. At the argument, the matter alone pressed upon the Court was that just spoken of, relating to the alleged contract, and that is the only one now calling for discussion.

That the presence of such a requirement as above stated in the draft of a contract and the absence of compliance with it may have the effect of leaving the paper without any efficacy as a contract until the lacking signature is supplied, seems clear enough upon reason as well as upon authority: see *Car Adv. Co. vs. Distilling Co.*, 49 Pa. Super. Ct. 442. But, like many other provisions inserted for the protection or benefit of one of the parties to a bargain, it may be waived. *Cuilibet licet renunciare juri pro se introducto*. And the question of waiver is ordinarily one for the jury: *Eckert vs. R. R. Co.*, 211 Pa. 267, 277; *Pittsburg C. Co. vs. R. R. Co.*, 227 id. 90, 99, being for the Court only where the facts are undisputed and the inference from them one of law; *ibid.* The fact that the company accepted the payment or "deposit" of \$175 and retained it until after Aug. 1 is not open to serious question. And the testimony of the defendant's branch manager, between whom and the plaintiff the transaction took place, indicates very strongly that whilst the word "contract" is avoided, the paper was looked upon as an "order," and as such complete enough to be accepted by the defendant, though signed only

by one of its salesmen as above stated. Is the proper inference to be drawn that defendant waived further and strict compliance with the mode of execution it had itself prescribed for its own protection or benefit?—or is it not? Obviously that was for the jury to decide; and their decision depending upon presumptions of fact, there is no rule of law whereby its correctness can be determined by the Court: see *Trust Co. vs. R. R. Co.*, 160 Pa. 590, 600. Tested by the principle that a verdict is to be understood and the facts found by it ascertained by reference to the charge of the Court: see *Mintzer vs. Hogg*, 192 Pa. 137, 144; *Smith vs. Shields*, 194 id. 635; *Kaechele vs. Traction Co.*, 15 Pa. Super. Ct. 73, 76, it is very clear that the jury in this case have affirmed the waiver by defendant of the requirement in question. The result is that we have here a case of a contract of sale and a failure on the part of the defendant to live up to it, entitling the plaintiff to damages; and there seems to be no room either for a judgment non obstante veredicto or for the granting of a new trial.

The rules to show cause are discharged.

GOTTSCHALL vs. WELLER.

Negligence—Contributory Negligence—Automobile Truck—Question for the Jury.

1. On the trial of an action for damages for personal injuries resulting from the alleged negligence of the defendant's employee in driving an automobile truck, a verdict for the plaintiff will be sustained where the plaintiff adduced evidence that the truck was driven around a corner down a crowded street without sounding the horn, that the driver paid no attention to signals and shouts to stop, and that instead of looking ahead he kept looking backwards and thus ran into the plaintiff, and the defendant's witnesses testified that the plaintiff stepped backwards right in the way of the truck without looking in the direction in which he was stopping.

2. The existence of contributory negligence on the part of a plaintiff can be declared by the Court as a matter of law only in clear cases. Where the testimony is conflicting or susceptible of different inferences, it is for the jury.

In the Court of Common Pleas of Berks County.

No. 52 August Term, 1917.

Trespass. Trial and verdict for Plaintiff.

Rule for new trial and for judgment non obstante veredicto.

Wilson S. Rothermel for Defendant and Rules.

H. K. Dumn contra.

Opinion by Endlich, P. J., October 26, 1918.—Early in the afternoon of May 26, 1917, the plaintiff and a number of other persons were waiting in South Second street to form in order for a flag-raising parade which was about to take place. There were, according to different estimates, 50, 100 or 200 persons gathered together approximately 50 or 100 feet south of the intersection of Penn and Second streets on the western and shady foot-pavement and extending 12 or 15 feet into the street. Defendant's two-ton automobile truck, coming along at a speed variously stated as 4, 10 and 12 miles an hour, turned from Penn street into South Second street on its western side, where under ordinary circumstances it belonged, but where on this occasion the crowd was collected, whilst the remaining portion of the street to the east was practically clear to a width of about 20 feet. The grade of Second street south of Penn is slightly downwards in the direction in which the truck was going. There was evidence that its driver did not sound his horn,—this being contradicted, however, by testimony on the defendant's side. Further there was evidence, also contradicted, that the driver paid no attention to signals given to him and shouts addressed to him to stop, and that instead of looking ahead he kept looking backwards. The crowd in front of him opened or scattered to let the truck pass through. The plaintiff, however, who was in the midst of it in the street, with his back turned to the approaching truck, was struck by its right front wheel at the heel of his left foot, thrown down and painfully injured. It was testified on the side of the plaintiff that at the time of the collision he was standing still, but on the defendant's side that he stepped backwards right in the way of the truck without looking in the direction in which he was stepping. The jury was told in the charge that if the defendant's contention in this particular was true, the plaintiff was guilty of contributory negligence and not entitled to recover, but that if it was not true, the question of defendant's negligence would have to be passed upon by the jury. The verdict was for the plaintiff, and the defendants obtained these rules for a new trial and judgment n. o. v.

It is well settled that the existence of contributory negligence on the part of a plaintiff can be declared by the Court as a matter of law only in clear cases; *Mortimer vs. Traction Co.*, 216 Pa. 326; *Joyce vs. R. R. Co.*, 230 id. 1; *Thorne vs. Transit Co.*, 237 id. 20; *Cramer vs. Aluminum Co.*, 239 id. 120; *Schmidt vs. Ry. Co.*, 244 id. 205, (and see *Di Grazio vs. R. R. Co.*, 261 id. 364; *Maynard vs. Barrett*, *ibid.* 378), and that otherwise, where the testimony is conflicting or susceptible of different inferences, it is for the jury. So here, if the plaintiff's story was substantially correct, the driver of defendant's truck was

bound to see the plaintiff and if practicable avoid striking him,—a thing which would appear to have been feasible upon defendant's own statement that the speed of the truck was about four miles per hour. Moreover, it must not be overlooked that the eastern half or more of the street afforded a virtually clear passage: see *Smoker vs. Locomotive Wks*, 261 Pa. 341. On the other hand, if the defendant's version is believed, the plaintiff acted carelessly and brought his injury upon himself. The question of defendant's negligence was thus in the case and was for the jury, and so was the question of plaintiff's contributory negligence. The case was submitted to the jury upon the lines indicated, and no exception was taken by the defendants to the charge, but only to the refusal of a point asking for binding instructions. Nor has any satisfactory reason been brought to the notice of the Court either for the granting of a new trial or for the entry of judgment non obstante veredicto, and therefore,—

The rules to show cause are discharged.

STRASSER vs. SEAMAN.

Practice, C. P.—Trespass—Appeal for Alderman's Judgment—Affidavit of Defense Raising Question of Law.

In an action of trespass brought into the Common Pleas on appeal from the judgment of an alderman, judgment will be entered for the defendant on an affidavit of defence raising a question of law where the transcript clearly shows that the action was based on the defendant's negligent driving of an automobile.

In the Court of Common Pleas of Berks County.

No. 34 March Term, 1918.

Trespass. Affidavit of defense raising questions of law.

H. J. Dumn, for defendant.

H. F. Heinly, for plaintiff.

Opinion by Wagner, J., October 26, 1918.—This is an action of trespass brought into court upon appeal from the judgment of an alderman. The defendant in his affidavit of defense raises this question of law: Want of jurisdiction in the alderman for the reason that the suit is for consequential damages arising from defendant's negligence. The alderman's transcript states that: "Plaintiff claims the recovery of damages...*...*...for injury done and committed to an

automobile the property of the plaintiff by the defendant negligently driving by force an automobile operated by him into and against the said automobile of the plaintiff." Plaintiff contends that because the words "by force" are used that the alderman had jurisdiction, and cites as authorities: *Strohl vs. Levan*, 39 Pa. 177, and *Gingrich vs. Sheaffer*, 16 Pa. Superior Ct. 299.

It is clear from the transcript that the negligent driving of the defendant is made the basis for the recovery of damages. The additional words "by force" as used, if they mean anything, mean merely that by the negligent driving the automobile with force was projected against the automobile of the plaintiff, thereby causing the damage claimed.

Gingrich vs. Sheaffer, *supra*, has no application to this case. Whilst the injuries in that case resulted from negligence, it was not the negligence that was sued upon and for which the plaintiff recovered, but for \$40, being the amount expended by plaintiff at the special instance and request of the defendant. That is, it was a suit in *assumpsit* upon a contract. The court there specifically says, on page 305: "The first was based on express contract and was clearly within the jurisdiction of a justice of the peace." The court held that the second part of plaintiff's claim of \$21 for damages alleged to have been sustained by reason of defendant's negligence, could not be recovered.

Strohl vs. Levan, *supra*, was not a case of negligence, but one of wilful wrong, as is clearly shown by the facts of the case, and by the charge of the court below, where (p. 178) the court says: "It was the duty of the defendant not only to allow him to pass, but to have facilitated his movements in that way. It was clearly his duty to have yielded part of the road if he could. If not, he should have stopped his team and have allowed the plaintiff to pass. He was not asked to do either. The plaintiff was willing to make his way round the wagon or team. If you believe the evidence, the defendant was not willing that he should do so, but, sitting on his wagon with a load upon it, and four mules attached to it, allowed his son to start the team at a rapid rate to prevent his passage. Failing in that, the whip was applied, and the team pursued the light carriage, doubtless with a view of punishing plaintiff for having accomplished a passage round them. If such was the case the act was wrong, and the party deserves to be punished."

Neither of these cases supports plaintiff's contention, but are authorities for defendant's contention. See also *Thilow*

vs. Philadelphia Traction Co., 4 Dist. Rep. 83; Lynch et al. vs. Alderfer, 6 Montg. Co. Law Rep. 108.

Judgment is directed to be entered in favor of the defendant.

BORKEY vs. FAUST.

Practice, C. P.—Verdict—Form of Verdict.

Where the verdict actually rendered by the jury accords with the form prepared by it in the jury room it will be sustained.

In the Court of Common Pleas of Berks County.

No. 33 January Term, 1917.

Trespas. Trial and verdict for plaintiff.

Rule to show cause why the verdict entered should not be stricken from the record.

Caleb J. Bieber, for defendant and rule.

C. H. Ruhl, contra.

Opinion by Wagner, J., October 26, 1918.—This is an action in trespass by plaintiff against defendant for damages which plaintiff contended he sustained because defendant entered upon plaintiff's premises and cut down and removed from his land four trees and removed a fence at the dividing line and committed other unlawful acts upon the premises. The evidence showed that the fence separating the lands of the two parties was what is known as a worm fence. It was agreed by the parties that the zigzag location of this fence did not constitute the boundary line, but that the boundary was represented by a straight line. Under the evidence, the jury could have rendered one of these verdicts: First, in favor of the defendant; second, in favor of the plaintiff for nominal damages; and, third, in favor of plaintiff for substantial damages. It was admitted by defendant that he had taken into possession and farmed the entire tract of land covered by the worm fence. Under this admission the jury could have rendered a verdict for the defendant only upon the ground that the straight boundary line was on the outer edge of or beyond the ground occupied by this zigzag fence on the side towards plaintiff's premises.

The verdict returned and recorded was "for plaintiff for six cents damages and costs." That is, a verdict for nominal damages. The verdict slip contains this: "That the jurors find

that the dividing line between the Faust and Borkey farms should be the centre line of the old worm fence. We find not to allow the plaintiff any damages." Upon the return of the jury to the court room the court explained to it that a verdict in that form could not be taken, and asked, in view of the form prepared in the jury room, and the evidence and admission in the case, whether by it they intended a verdict for plaintiff for nominal damages. Upon receiving an affirmative answer, the verdict as recorded was then rendered by the jury.

Defendant contends that error was thus committed in that it is plainly evident from what was contained on the verdict slip that what it intended to return was a finding in favor of the defendant. He therefore asks us at this time to so change the verdict. When the jury found, as is evidenced by the verdict slip, that the boundary line between the two farms was the centre line of the old worm fence, it then conclusively followed, from defendant's aforesaid admission, that defendant had taken possession of said part of plaintiff's land. This made it impossible for them to find a verdict for defendant.

The next matter for it to determine was whether to find a verdict for plaintiff for nominal or substantial damages. The only evidence as to the amount of plaintiff's damages related to the value of the trees alleged by plaintiff to have been on his land, and to have been unlawfully cut down and removed by defendant. Whether substantial damages were to be awarded depended upon its finding whether these trees were on plaintiff's or on defendant's land. "We find not to allow the plaintiff any damages," in the verdict slip, was evidence of a finding that these trees, for which substantial damages were claimed, were on defendant's land. It is therefore clear, when we compare this verdict which as actually rendered by the jury, and which must be considered its verdict: *Com. vs. Dudley*, 46 Pa. Superior Ct. 337, 347, with the form prepared in the jury room, that the verdict rendered entirely accords with the jury's conclusion in the jury room. In view of the plain agreement of the verdict rendered with the form prepared by the jury in the jury room, it is not necessary to consider the question whether the court has the power to at this time change the verdict, as requested by defendant. The defendant based his whole argument upon the rule to show cause why the verdict entered in favor of the plaintiff should not be stricken from the record and one entered in favor of the defendant, and asked that the rule for a new trial be discharged.

Both rules are discharged.

SECOND NATIONAL BANK OF READING vs. ZABLE.**Bills and Notes—Checks—Post-dated Check—Payment by Mistake—Stopping Payment—Affidavit of Defence.**

On March 14, 1918, the defendant presented to plaintiff bank a check drawn by A. dated a week later, and the teller, not observing that the check was post-dated, inadvertently paid the amount thereof to the defendant, on March 16, 1918. A. stopped payment on the check. Two days later the plaintiff notified the defendant of the mistake in payment, that payment of the check had been stopped, and demanded a return of the amount mistakenly paid. Upon defendant's refusal to pay, plaintiff protested the check and sued the defendant, who filed an affidavit of defence admitting the cashing of the post-dated check but averring a want of knowledge that the plaintiff's teller inadvertently paid the check by mistake. Rule for judgment for want of a sufficient affidavit of defence made absolute.

The drawer of a check has the right to stop payment any time prior to its date and actual payment.

In the Court of Common Pleas of Berks County.

No. 95 May Term, 1918.

Assumpsit.

Rule for judgment for want of a sufficient affidavit of defence.

Isaac Hiester, for plaintiff and rule.

Charles H. Tyson, for defendant.

Opinion by Wagner, J., October 26, 1918.—Plaintiff brought suit against the defendant on a check of which H. W. Ailes was the drawer to the order of the defendant, Joseph Zable, on the plaintiff, the Second National Bank of Reading, for \$35. The check was dated March 21, 1918. Plaintiff's declaration avers that on March 14 the defendant presented to plaintiff this check endorsed by him, and demanded payment thereon. That plaintiff's teller, not observing that the check was post-dated, inadvertently paid the amount thereof to the defendant, believing that it was then due, and that the payment of said check had been made through teller's mistake. That on March 16, Ailes stopped payment on the check. That on March 18 plaintiff notified the defendant of the mistake in payment, that payment of the check was stopped, and thereupon demanded from defendant the amount paid on the check by plaintiff. Upon payment being refused, plaintiff, on March 21, protested the check.

The defendant admits that the check was dated March 21, 1918, and that it was cashed on March 14, 1918, but avers to plaintiff's statement that its teller did not observe that the check was post-dated and inadvertently paid the same through mistake, its want of knowledge of these facts, and asks that plaintiff be put to proof thereof.

It is clear that this being a post-dated check, was upon the face of it, payable not on March 14, but upon its date March

21. The post-dated check was an "engagement on the part of the drawer that he either had or would have funds in the hands of the payer, at the day of its date." *Hill vs. Gaw*, 4 Pa. 493, 496. In *Champion vs. Gordon*, 70 Pa. 474, 476, we have: "What the drawer undertakes is, that on a day named he will have the amount of the check to his credit in the bank. In the mean time he wants the full and free use of his entire deposit. It is not denied that a post-dated check cannot be presented for acceptance. That is by implication payable on a future day."

In the affidavit of defence there is no averment that this check was paid in any manner other than is usual for checks to be paid. The check was drawn against a deposit and was a mere order by the drawer to the bank, on the date of the check, out of said deposit, to pay the amount of the check: *Werley vs. Dunn*, 56 Pa. Superior Ct. 254, 258. Payment of this check having, therefore, been made prior to its date, upon the face of it, a mistake was made. The drawer had the right to stop payment of the check at any time prior to its date and actual payment. After notice of non-payment the bank could pay out only at its peril: *Saylor vs. Bushong*, 100 Pa. 23, 27. In *German N. Bank vs. Farmers' D. N. Bank*, 118 Pa. 294, at page 313, we have: "I presume no one at this day questions the right of the drawer of a check to stop the payment thereof. This is usually done by notice to the bank upon which the check is drawn. If the bank pay after such notice it does so at its peril." The affidavit of defence does not specifically deny that the drawer stopped payment prior to its date.

We have then, in this case, as disclosed by the pleadings, a clear mistake in the payment of the check. Money so paid may be recovered: *Meredith vs. Haines et al.*, 14 W. N. C. 364, 366. "The fact that the person making the payment has the means of knowledge at hand and overlooks the same by an inadvertence, is immaterial if the party receiving the same is not entitled to it." *Girard Trust Company vs. Harrington*, 23 Pa. Superior Ct. 615.

Rule for judgment for want of a sufficient affidavit of defence made absolute.

FEGLEY vs. ROTHERMEL.

Contracts—Heating Plant—Evidence—Weight of Evidence—New Trial.

In an action of assumpsit for labor and material furnished in installing a heating plant in the house of the defendant, a verdict for the plaintiff will be set aside as against the weight of the evidence, where a fair consideration of the evidence impels the conclusion that the plant was of no use and unsatisfactory to the defendant and that the plaintiff had agreed that he would remove the system if it proved unsatisfactory to the defendant.

In the Court of Common Pleas of Berks County.

No. 23 March Term, 1918.

Assumpsit. Trial and verdict for plaintiff.

Rule for new trial.

J. H. Rothermel, for defendant and rule.

F. A. Marx, for plaintiff.

Opinion by Wagner, J., October 26, 1918.—Plaintiff's action against the defendant is for \$597.66, with interest, for labor and material furnished in installing a heating plant in the hotel and dwelling house of the defendant. The jury found a verdict for plaintiff for the amount claimed. The defense was that at the time the parties entered into the contract for the installation of the heating system, plaintiff agreed with the defendant that the system was to be satisfactory to him (defendant), and, if not, he (plaintiff) would remove it. The defendant asks for a new trial on the ground that the verdict was against the weight of the evidence.

It is plain from the evidence that the system as installed by the plaintiff was not even usable, and, therefore, could not have been satisfactory to the defendant. Defendant contended that the fault of the system lay in not using large enough main and branch pipes, and in faulty construction, which caused many leaks. The system was installed the latter part of November or the beginning of December, 1917, and was used until February 25, 1918, when, on account of the failure of the system to heat the building, defendant was obliged to discontinue its use.

Defendant's witness Lawrence J. Linderman, a traveling salesman, testified that he got to this hotel twice a week from December until February 25. That in one of the pipes there was a split of six inches; that in the front main line there were 19 leaks and in the back main line 18 or 19. That in the dining room they had to have kettles hanging at the pipes to catch the water at the joints. That he saw these conditions every time that he was there.

The testimony of John S. Rothermel, defendant, Charles K. Fisher, who is in the plumbing and heating business, A. W. Luck, a heating engineer, and Mrs. Rothermel, wife of the defendant, corroborates that of Linderman as to the leaks. That there were some leaks was admitted by plaintiff. When he was asked, "They had to hang kettles up?" he evaded the question, and answered, "They were small leaks, they were supposed to take up (N. of T., p. 9)."

William B. Roberts, plaintiff's witness, who was employed by plaintiff to put in this system, testified that there were

leaks, but as an excuse therefor said that, "As far as my experience goes you get them on almost every job, but they pack themselves (p. 14)."

A fair consideration of the entire evidence impels the conclusion that the pipes of this heating system were not properly fitted or joined together. The principal complaint was that the system failed to properly heat the building. Plaintiff's explanation of this was that certain radiators that the defendant had on hand and which he claimed defendant had requested him to use, were insufficient in radiation. It was, however, established beyond question, as is testified by plaintiff (p. 11), that the radiators in the bar room, the bath room, and the sleeping room above the bar room were large enough to properly heat these rooms. Mr. Luck testified that the bath room radiator had an excess radiation of 20 feet, and yet it was two of these, the bar room and the bath room, that the defendant had the most trouble to heat. The testimony most conclusively shows that the system did not in any way comfortably heat these two rooms. They were seldom able to get a temperature in the bar room beyond 56 degrees, and the bath room was so cold that water froze therein. These circumstances would strongly indicate that the trouble lay, not in the radiation, but in some other part of the system.

A. W. Luck, a heating engineer of 30 years' experience, clearly and convincingly explains the trouble. In his testimony, also supported by other witnesses, he says that the main and branch pipes were too small. That at each of the numerous leaks a vacuum was formed in the pipes, which prevented a proper circulation of the water. This explains why, as Mr. Rothermel testified, it took them every morning about an hour to fill the radiators with water, and to draw out the air.

The only time that plaintiff tried to test this system was one afternoon in December. Defendant testified, and he is not contradicted, that upon six or seven different occasions he made complaints to the plaintiff about the system not working; that he received no relief, and the only answer he received to his last complaint was that he (defendant) should take it up with his (defendant's) lawyer. The strongest evidence that this heating system did not do its work was the fact that defendant was obliged to discontinue the use thereof on February 25, at a time when heat was most needed. The evidence uncontrovertibly proves that this system, as installed, must necessarily have been not only unsatisfactory to the defendant, but not even of use to him.

The question then is: Was the contract between the plaintiff and defendant as contended by defendant, that this system had to be satisfactory to defendant when installed? The de-

fest weight of the evidence, it cannot be said that a dispute, within the meaning of the Act, has arisen. On the other defendant, his wife, son, and Edward F. Swavely testified that this was the agreement. This is denied by the plaintiff. We have then four witnesses testifying to the agreement that it had to be satisfactory, as against the plaintiff's testimony that such was not the agreement. Were this the only circumstance in the case we realize that the mere weight in the number of witnesses that the defendant produced, especially when their relationship to him is considered, would not be sufficient to warrant the granting of a new trial upon the ground that the verdict was against the weight of the evidence. When Mr. Fegley was asked by his counsel what the contract was, he said, "We had no contract whatever. The only contract we had is that I gave him a price on the boiler and a price on two radiators (pp 3, 4)," and that the only thing that he (defendant) asked was what I was getting an hour for help, and I informed him 50 cents an hour. It is hardly probable that the owner of a hotel property would enter into a contract to install a steam heating plant on a loose arrangement of this kind. When plaintiff was further interrogated by his counsel, he answered that he was told to install this heating system and use the radiators that were there. That only the sufficiency of the boiler was spoken about. That defendant wanted him to guarantee that the system "would heat the bath room," but that he would not make any guarantee.

It would seem strange that the defendant would insist upon a guarantee with reference to the bath room and not to other portions of the house. From the testimony of Mr. Rhodes, one of plaintiff's witnesses, we have that when the system did not work the question at once raised by the defendant was that it did not come up to the contract in that it was not satisfactory. We consider that a new trial should be granted upon defendant's reason that the verdict is against the weight of the evidence.

Rule for new trial made absolute.

BURBECK'S ESTATE.

Decedents' Estates—Wills—Issue to Common Pleas.

1. The Orphans' Court will not direct an issue to the Common Pleas to try the validity of a will where the testimony is such that, after a fair and impartial trial resulting in a verdict against the proponents of the alleged will, the trial judge, after a careful review of all the testimony, would feel constrained to set aside the verdict as contrary to the manifest weight of the evidence. On the other hand, if the state of the evidence is such that the judge would not feel constrained to set aside the verdict, the dispute should be considered substantial, and an issue to determine it should be directed.

Same—What Constitutes Testamentary Capacity.

2. A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in; the full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the recipients of his bounty.

Same—Wills—Unnatural Will.

3. A will is unnatural in a legal sense only when it is contrary to what the testator from his known views, feelings and intentions would have been expected to make. When it is in accordance with such views it is never unnatural, however much it may differ from the ordinary actions of men in similar circumstances.

In the Orphans' Court of Berks County.

In the matter of the Appeal of Charles Weber, guardian of Meta Burbeck, surviving grandchild, from the decision of the Register of Wills, admitting to probate a certain paper purporting to be the last will and testament of the decedent.

C. H. Ruhl, W. H. Sharman, Joseph R. Dickinson, and Edwin L. DeLong for the appellant.

Jefferson Snyder and J. Wilmer Fisher for the proponents.

Opinion by Schaeffer, P. J., April 28, 1917—On March 16, 1914, George H. W. Burbeck, executed a paper purporting to be his last will and testament, wherein he bequeathed \$100 to Charles Evans Cemetery Company, \$1,000 to Arthur Green, \$50 to his only granddaughter, and the residue to George W. Green and Annie, his wife, share and share alike. Mr. Burbeck died on April 11, 1915, and on April 16, 1915, his will was duly admitted to probate. On March 25, 1916, an appeal from the Register's decision admitting the alleged will to probate was taken by Charles Weber, guardian of Meta Burbeck, the granddaughter of the decedent. This Court is now requested to direct an issue to the Court of Common Pleas, to try the genuineness of the paper in question. The appellant denies the validity of this will, for the reason that, at the time of making it, George W. H. Burbeck was not of sound and disposing mind, memory, and understanding; and, further, that the will was procured by undue influence. The question for our consideration is, whether upon the testimony presented by the respective parties such a "substantial dispute" as to the testamentary capacity of the testator and the exertion of undue influence has arisen, as to warrant a submission of it to a jury.

The rule in such cases is well settled: "If the testimony is such that, after a fair and impartial trial, resulting in a verdict against the proponents of the alleged will, the trial judge, after a careful review of all the testimony, would feel constrained to set aside the verdict, as contrary to the mani-

hand, if the state of the evidence is such that the judge would not feel constrained to set aside the verdict, the dispute should be considered substantial, and an issue to determine it should be directed." Knauss's Appeal, 114 Pa. 20; Donneley's Estate, 227 Pa. 609; Schweitzer's Estate, 228 Pa. 231; Phillips' Estate, 244 Pa. 35.

The authoritative test, therefore, is whether upon all the testimony, a verdict against the proponents of the will should be allowed to stand; and if such a verdict ought not to be allowed to stand, an issue ought not to be awarded: Donneley's Estate, *supra*.

In determining the question, whether we should sustain a verdict against the will under the testimony, we must keep in mind the meaning of testamentary capacity. What constitutes testamentary capacity has been laid down so often and in so many cases, that it is virtually needless to cite authorities. "A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in; the full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the person and objects he desires shall be the recipients of his bounty." Wilson vs. Mitchell, 101 Pa. 502; Smith's Estate, 250 Pa. 87. If, from any cause, an alleged testator is so enfeebled in mind as to be incapable of knowing the property he possesses, of appreciating the effect of any disposition made by him of it, and of the distinctly understanding to whom he intends to bequeath it, he is without the testamentary capacity required to make a will: Leech vs. Leech, 21 Pa. 69. But "if he understands, in detail, all he is about, and chooses, with understanding and reason, between one disposition and another, it is sufficient." Daniel vs. Daniel, 39 Pa. 208.

We must remember that neither age nor sickness, nor extreme distress, nor debility of body, will affect the capacity to make a will, if sufficient intelligence remains. The failure of memory is not sufficient to create the incapacity, unless it be total, or extends to the immediate family and property: Wilson vs. Mitchell, *supra*.

"Testamentary capacity is the normal condition of one of full age, and the affirmative is with him who undertakes to call it in question, and this affirmative he must establish, not in a doubtful, but in a positive manner." Grubbs vs. McDonald, 91 Pa. 236. It is, therefore, proper to start with the presumption that testator was of sound and disposing mind, sanity being the normal mental condition, and such *prima facie* "can only be overcome by clear, definite, circumstantial and weighty evidence of facts not reconcilable with the possession of testamentary capacity." Morgan's Estate, 219 Pa. 355.

With these legal principles in mind, we must determine whether the testimony presented by the respective parties raises such a substantial dispute, as to the testamentary capacity of the testator, as requires us to submit it to a jury, for solution.

George H. W. Burbeck, was about seventy-four years of age at the time of his death, and a widower leaving a grandchild, Meta Burbeck. His wife died a few years ago; and his only son, the father of the surviving grandchild, died in Atlantic City, about three years ago. The testator was a life-long resident of the City of Reading, with the exception of about three years, when he resided in Atlantic City with his son. After the son's death, he came to Reading and lived here up to the time of his death. The evidence adduced at the hearing by the contestants, shows that the decedent was unwell for some time, and was attended by Dr. Ege, from 1912 to 1914. The doctor testified, that the decedent was not under his constant care, during this time, but came to his office off and on, when he was not in the Soldiers' Home; that he was suffering with diabetes insipidus, which brought on marasmus of the brain, making him incapable of transacting any business and resulting in hallucinations and lunacy; that he was so enfeebled in body and mind by the loss of blood and semen, that he was not competent to take care of his affairs; that his conduct, brought on by his physical and mental distress, showed that he did not appreciate the extent and character of his estate, nor the objects of his bounty. A number of witnesses were called, who testified that they knew the decedent for many years, having worked with him at different places in the city some years ago, and that in their judgment he was mentally weak. William Cole, who saw the testator about two or three times a week after he came back from Atlantic City, said, that his conversation was "drifting and not intelligent;" that the decedent complained to him about the Greens,—the beneficiaries in the will—being after him for money, and that he finally conveyed a house to one of them, on certain terms, after which they never came near him. On cross-examination the witnesses admitted, that Mr. Burbeck was not 'crazy, only he did not have the mind he should have had.' The principal witnesses for the contestants, besides Dr. Ege, were Mrs. Louisa Burbeck, the daughter-in-law and mother of the surviving grandchild, and her sister Meta Orff, who was at the Burbeck house in Atlantic City. Miss Orff testified, that the conduct of the decedent was "really unbecoming of any gentleman; that he left his bed room door open at the son's house in Atlantic City, and was lying uncovered in the bed, while the other occupants of the house passed the door; that he came down

stairs to the door virtually nude, and made inquiry concerning a woman; that while in his shirt sleeves, dirty, and poorly dressed, he came to the station when his son's body arrived here for burial, and said, "when is this thing going to come off;" that he acted in a very peculiar and silly manner at the cemetery; that when sent for a watermelon, he returned with clams; that at times he did not understand conversations with other people; that he would act very peculiarly around the house, taking dishes from the table, while the folks were dining, and do "things which other people would not think of doing."

Louisa Burbeck, the daughter-in-law, said the conduct of the testator at times was almost unbearable. She asserts, that his habits were filthy and repulsive; that he was dirty and oblivious to decency and self-respect; that he was suffering with delusions, about his deceased wife being after him and talking about him; that he tried to poison the whole family, saying he wanted to be the last of the Burbecks; and that many additional incidents detailed by her demonstrated that he was mentally unsound and did not know what he was doing.

It was also shown, that the Greens acquired some of his real estate before he died, for what can be regarded as an inadequate consideration; and that the letters offered are the product of an irresponsible and imbecile mind.

These were the leading characteristics of the case upon the part of the contestant, and in connection, therewith, most of the witnesses called by him testified, that in their opinion, the testator was not competent to make a will.

The proponents of the will have shown that it was written by L. W. Frankhouser, a real estate agent who knew the testator since August 4, 1912, when he started to attend to his pension vouchers; that the decedent, who often came to his place of business, dropped in one day and asked him to write his will; that the decedent furnished the data and the will was thereupon prepared and duly executed; that the decedent gave his reasons for not giving more to the granddaughter; that he expressed a desire to Mr. Frankhouser to transfer his property to some one for a certain amount of income each year, and wanted the witness to prevail upon Mr. Green to take it off his hands; and that from his dealings with the decedent, his conversations and observations with and of him during the years he came to his office and when the will was prepared and signed, the decedent was of sound mind and knew what he was doing.

J. Wilmer Fisher, Esq., a reputable member of the bar, detailed a most convincing array of facts, to prove the testamentary capacity of the testator. He said, that he met the

testator at his office on November 23, 1914, concerning the transfer of his property to Mr. Green; that the testator explained to the witness the terms which should govern the sale and sought his advice; that he pointed out to the testator the effect of the transfer according to the terms fixed by him, and that the testator replied, "he was satisfied and wanted it this way;" that he brought into the office the will written by Mr. Frankhouser and asked Mr. Fisher to examine it; that he said, he wanted to know whether the will would stand on account of the small bequest to his granddaughter; that the reason he was anxious to have it examined by a lawyer was, because he did not want any of his property to go to the Orffs, who would get it after the death of the granddaughter, if he left it to her, they having given him rough and bitter treatment. Mr. Fisher said, he called the testator's attention to the small bequest to the granddaughter and asked him whether he thought that was right, but that the testator was firm and unrelenting in his purpose, to virtually exclude her from getting any part of his estate, on account of her mother and aunt who had maltreated him on different occasions. Mr. Fisher also testified, that having a large practice in the Orphans' Court, he has made it a rule to be very observant of the mental condition and conduct of parties whose wills he prepares and on which he appears as a witness. He said, that the decedent dropped in at his office quite often, between November 15th, 1914, and January 1, 1915, that he was a good conversationalist, mentally keen and alert; that he was precise and definite in what he did; and that he did not discover the slightest signs of mental unsoundness in the testator.

The Nicholsons, with whom the decedent boarded up to the time he was sent to the hospital, and who spoke with him often and knew him for years; said he was mentally all right. Six other disinterested witnesses who knew the decedent for many years and who saw him on or about the time he went to the hospital testified, that his mind was good, and that he was perfectly able to look after his matters. That he was able to transact his business is evidenced by the fact that he had charge of his property and money right along and that no steps were taken to have him declared a weak-minded person. One of the six witnesses, viz: Ida T. Prince, recited a story in connection with this case that is actually sad and pathetic. Her description of meeting the testator on the day of the son's funeral at Atlantic City, while going to the house of mourning, when he said "They won't let us in;" their coming to the door which was locked and finally opened by Miss Orff, when she looked at the testator and said, "Have you got the paper; you can come in if you have got

the paper"—meaning thereby a note or mortgage which the decedent held against the son; that he said, "No, I haven't, but I can get it," she looked up and said "you have one-half hour's time to get it, if you bring it, you can get in," and his then turning away and not being permitted to view the remains of his only child, is indeed, touching. Mrs. Prince said, that while she was in the room where the son's body lay, a spray of flowers came in with the testator's card on them, and that they, Mrs. Burbeck and Miss Orff, sent them to the kitchen, until the paper came. This heartless conduct at the door is not denied by Mrs. Burbeck or Miss Orff, and is in fact admitted by them. There were other witnesses, including the Greens, who were the warm and intimate friends of the decedent and his wife for many years said, that the testator was of sound mind when the will in question was made.

We have thus endeavored to present sufficiently the testimony produced by the two sides affecting the mental condition of George H. W. Burbeck.

Under this testimony we do not see how a serious dispute arises as to the testamentary capacity of the testator. The proof of Mr. Burbeck's competency to make a will and manage his own affairs is so overwhelming, that no Judge would permit a verdict against this will to stand. The conduct of this testator in almost disinheriting his granddaughter, instead of making against his mental soundness is one of the strongest facts establishing his mental competency.

It is contended that this will is an unnatural one, and evidence of mental unsoundness and of undue influence. The testator felt, that he had been badly treated by Mrs. Burbeck and her sister, when they barred him from the house on the day of his son's funeral, and he then made up his mind that his estate should not get into their hands and even went to the extent of almost cutting out the granddaughter.

A will is unnatural in a legal sense only when it is contrary to what the testator from his known views, feelings and intentions would have been expected to make. When it is in accordance with such views it is never unnatural, however much it may differ from the ordinary actions of men in similar circumstances: *Morgan's Estate*, 219 Pa. 355-357.

There is no evidence of any undue influence in this case; and this allegation was not pressed at the argument.

The facts proving the testator's soundness of mind are so conclusive, while the opinions to the contrary are founded on facts so insufficient, that we do not see how a Court could permit a verdict against the will to stand.

We cannot, therefore, say that a serious dispute has arisen as to the testamentary capacity of George H. W. Burbeck.

and we must refuse to direct an issue to the Common Pleas as requested.

And now, April 28, 1917, the decision of the Register, dated April 16, 1915, admitting the said will to probate is sustained and the appeal therefrom is dismissed.

DEELMAN vs. SHERMAN et al.

Real Property—Covenants—Building Restrictions—Porches—Equity—Injunction.

1. In construing covenants or restrictions as to the use of property the circumstances and conditions surrounding the parties and property must be considered as well as the manifest objects of the grant or restriction. The intent of the parties and the object of the deed or restriction should govern, giving the instrument a just and fair interpretation.

2. In the construction of building restrictions, all doubts are to be resolved against the restriction, and in favor of the free and unrestricted use of the property.

3. Where a deed conveying a lot of ground contains the restriction that any building thereon erected must be built not less than twenty feet south of the building line of a street, and the purchaser builds a house entirely south of the twenty foot restriction and attaches a porch to the house extending beyond the twenty foot restriction, the Court will not award a mandatory injunction to compel the removal of the porch.

4. The jurisdiction for a mandatory injunction will not be exercised except in the clearest cases.

In the Court of Common Pleas of Berks County in Equity.

No. 1186 Equity Docket, 1917.

Mandatory injunction.

Bill, answer, replication and testimony.

Henry Maltzberger, Samuel E. Bertolet and F. S. Livingston for plaintiff.

Cyrus G. Derr for defendants.

FINDINGS OF FACTS.

Opinion by Wagner, J., November 23, 1918—

1. The plaintiff is the owner in fee of a certain lot of ground with two brick dwelling houses thereon erected, situate on the south side of Greenwich street, between Fifth and Sixth streets, being Nos. 510 and 512 Greenwich street, Reading, Pa., and the occupant of No. 510 Greenwich street.

2. Plaintiff purchased said real estate from Anne McL. Mickle and John L. Mickle, her husband, by deed dated June 11, 1914, deed recorded on June 19, 1914, in the Recorder's Office of Berks County, in Deed Book No. 430, page 140. Said deed provides that the "premises are conveyed subject to condition and restriction that any building erected thereon must be built not less than 20 feet south of the building line of said Greenwich street."

3. The buildings erected on this lot are built at least 20 feet south of the building line of Greenwich street, in strict accordance with said covenant.

4. On June 6, 1914, Spencer L. McIlvain, single, was the owner in fee of a lot of ground situated on the southeast corner of North Fifth and Greenwich streets, Reading, Pa., containing in front on Greenwich street 94 feet, more or less, adjoining on the west plaintiff's aforesaid property. The deed to Spencer L. McIlvain provided: "that any building thereon erected must be built not less than 15 feet south of the building line of said Greenwich street."

5. Plaintiff, prior to June 6, 1914, entered into an agreement to purchase from its owners the premises described in Finding of Fact 1, subject to the restriction contained in Finding of Fact 2. Plaintiff's entering into and complying with said agreement was conditioned upon his obtaining from said Spencer L. McIlvain an agreement covenanting for building restrictions of the property in Finding of Fact 4, similar to those appertaining to the other real estate fronting on Greenwich street. In accordance therewith on June 6, 1914, plaintiff and Spencer L. McIlvain entered into the following agreement:

Agreement, Spencer L. McIlvain and Teunis Deelman. Agreement, dated the sixth day of June, A. D. one thousand nine hundred and fourteen, between Spencer L. McIlvain, singleman, of the City of Reading, County of Berks, State of Pennsylvania, party of the first part, and Teunis Deelman, of the same place, party of the second part.

Whereas, The said party of the first part, by indenture dated June 28, A. D. 1898, and recorded in the Office of the Recorder of Deeds for the said County of Berks in Deed Book No. 257, page 60, acquired title in fee simple to a certain lot of ground, situate on the southeast corner of North Fifth and Greenwich streets in the said City of Reading, containing on said Greenwich street ninety-four (94) feet more or less, subject, however, to the following condition and restriction, to wit: The above lot of ground is conveyed subject to the condition and restriction that any building thereon erected must be built not less than ten feet east of the building line of said Fifth street, and not less than fifteen feet south of the building line of said Greenwich street.

And Whereas, Anne McIlvain Mickle, wife of John L. Mickle, of the City and County of Philadelphia, said state, by indenture dated November 30, A. D. 1910, recorded in the said Recorder's Office in Deed Book No. 386, page 183, acquired title in fee simple to a certain lot or piece of ground with two dwelling houses thereon erected, being Nos. 510 and 512 Greenwich street, in the said City of Reading, containing in front on said Greenwich street sixty-five (65) feet

more or less, and bounded on the west by the said lot of ground of the said party of the first part, subject, however, to the following condition and restriction, to wit: The aforesaid premises are conveyed subject to the condition and restriction that any building erected thereon must be built not less than twenty feet south of the building line of said Greenwich street, which lot or piece of ground and houses of the said Anne McIlvain Mickle, she and her said husband are about to convey to the said party of the second part,

And Whereas, The said parties hereto desire that the building conditions and restrictions along said Greenwich street appertaining to all the said real estate shall be the same throughout, now know all men by these presents, that the said party of the first part for himself, his heirs, executors, administrators and assigns, in consideration of the premises, and of the sum of one dollar in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and of the acceptance by the said party of the second part of the said intended conveyance to him, doth hereby covenant and agree to and with the said party of the second part, his heirs, executors, administrators and assigns, that the said lot of ground of the said party of the first part shall be henceforth subject to the condition and restriction that any building thereon erected must be built not less than twenty (20) feet instead of fifteen (15) feet as aforesaid south of the southern building line of said Greenwich street.

In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written. Sealed and delivered in presence of

Howard L. McIlvain,

Henry Maltzberger,

(Seal) Spencer L. McIlvain,

(Seal) Teunis Deelman.

State of Pennsylvania }
County of Berks } ss.

On the 6th day of June, A. D. 1914, before me, the subscriber, a Notary Public, residing at Reading, said county, personally appeared the above named Spencer L. McIlvain, and in due form of law acknowledged the above agreement to be his act and deed, and desired the same might be recorded as such.

Witness my hand and notarial seal the day and year aforesaid.

My commission expires March 1, 1915.

Howard L. McIlvain, (Seal)

Notary Public.

State of Pennsylvania }
County of Berks } ss.

On the 6th day of June, A. D. 1914, before me, the subscriber, United States Commissioner for the Eastern District of Pennsylvania, residing at Reading, said County, personally appeared the above named Teunis Deelman and in due form of law acknowledged the above agreement to be his act and deed and desired the same might be recorded as such.

Witness my hand and official seal the day and year aforesaid.

Henry Maltzberger. (Seal)

United States Commissioner for the Eastern District of Pennsylvania, at Reading.

My commission expires July 1, A. D. 1917.

6. On July 13, 1916, Samuel M. Sherman, one of the defendants, purchased by deed from the heirs of Spencer L. McIlvain, then deceased, the lot of ground described in Finding of Fact 4, excepting the southern 10 feet thereof fronting on Fifth street, the deed reciting "the aforesaid lot or piece of ground is conveyed subject to the condition and restriction that any building thereon erected must be built not . . . less than 20 feet south of the building line of said Greenwich street." He then proceeded to erect and construct a building thereon fronting on North Fifth street, with its north elevation on Greenwich street, said building to be conveyed, with the appurtenant portion of the lot of ground consisting of the entire front on Greenwich street, with 50 feet fronting on North Fifth street, to Edward H. Knerr, one of the defendants.

7. On August 1, 1916, defendant, Samuel M. Sherman and wife, by deed, conveyed the lot described in Finding of Fact 6, together with the dwelling house then being erected thereon, to Edward H. Knerr, the other defendant, subject to the condition and restriction "that any building erected on said lot . . . must be built not less than . . . 20 feet south of the southern building line of said Greenwich street."

8. After the purchase of said property by Edward H. Knerr, Samuel M. Sherman finished the construction of said dwelling house. This house lies entirely south of the 20-foot restriction on Greenwich street, the nearest approach of the north wall thereof being .25 of a foot south of the 20-foot restriction line. The front of the house faces Fifth street on the west. On the Fifth street side is a covered porch. From this porch there extends, along the Greenwich street side, against the north wall of the house, a structure, the floor of

which is on a level with, and is a continuation of the floor of the front porch. It affords the only passageway or walk to a door on the Greenwich street side of the house. It is 34'6" long and 7' wide. It extends to the north beyond the 20-foot restriction line, at the eastern end a distance of 5.2' and at the western end 5.07'. It rests upon an 18" wide stone foundation wall built along the outer edge thereof within the ground. The wall is continued above the surface of the ground and is built of brick, with an Indiana limestone coping. The floor is made of concrete, on which is laid tile to conform with the tiled floor of the front porch. This bordering wall is 4' above the ground, and extends 1.8' above the floor. It has four pillar bases or pilasters, 18¾" square. It has no steps to the ground. It is like the front porch in appearance, materials used, and in construction, except in roof, supporting columns and steps. Its purpose is to furnish a walk or passageway from the front porch to the side door opening towards Greenwich street, and is so built as to conform to the general architecture of the house and front porch.

9. On April 1, 1869, Aaron Bright and Roxlena, his wife, granted to William McIlvain, Sr., Morton C. McIlvain, and William R. McIlvain, inter alia, the entire tract of land on the south side of Greenwich street, between Fifth and Sixth streets.

10. William McIlvain, Morton C. McIlvain, and William R. McIlvain, on March 28, 1890, conveyed house and lot, No. 524 Greenwich street, on the south side thereof, to Philip Fertig, subject to this building restriction: "It is a consideration and intended to form part of this indenture that the said Philip Fertig, his heirs or assigns, shall in rebuilding or altering stand the building or buildings so erected 20 feet back from the front house line on Greenwich street."

11. William McIlvain, Morton C. McIlvain, and William R. McIlvain, on February 18, 1890, conveyed to Mary T. Snook, house and lot of ground on the south side of Greenwich street, No. 522, subject to this building restriction: "It is a consideration and intended to form a part of this indenture that in rebuilding or altering the building or buildings so erected or altered shall stand back at least 20 feet from the front house line on Greenwich street."

12. Sidney H. McIlvain and Howard L. McIlvain, executors of Morton C. McIlvain, deceased, and Spencer L. McIlvain, on June 25, 1898, conveyed to William R. McIlvain a five-ninth interest in two houses and the lots of ground upon which the same were erected, on the south side of Greenwich street, being Nos. 518 and 520, subject to this building restriction: "Subject to the condition and restriction that any build-

ing erected thereon must be built not less than 20 feet south of the building line of said Greenwich street."

13. Morton C. McIlvain, William R. McIlvain and Spencer L. McIlvain, on November 21, 1894, conveyed to Charles H. Stevenson a house and lot located on the south side of Greenwich street, No. 516, subject to this building restriction: "It is a condition and intended to form a part of this indenture that no building shall be erected on said premises within a distance of at least 20 feet from the front house line on Greenwich street."

14. William McIlvain, Morton C. McIlvain, and William R. McIlvain, on April 22, 1887, conveyed to Clifford Pomroy a certain lot upon which a house was not yet built, being now 514 Greenwich street, situate on the south side of Greenwich street, said lot having a frontage along said Greenwich street of 28 feet, subject to this building restriction: "It is a part of the conditions that the said Clifford Pomroy shall stand his house back from the street house line in range with the houses Nos. 510 and 512 Greenwich street now erected."

15. William R. McIlvain and Spencer L. McIlvain, on June 25, 1898, conveyed to Sidney H. McIlvain and Howard L. McIlvain, executors of Morton C. McIlvain, deceased, a five-ninth interest in two dwelling houses, together with the lots of ground upon which the same were erected, situate on the south side of Greenwich street, being Nos. 510 and 512, subject to this building restriction: "The aforesaid premises are conveyed subject to condition and restriction that any building erected thereon must be built not less than 20 feet south of the building line of said Greenwich street."

16. Howard L. McIlvain, surviving executor of Morton C. McIlvain, deceased, on November 30, 1910, by deed conveyed to Anne McIlvain Mickle, grantor of plaintiff, the property described in Finding of Fact 1, subject to said building restriction.

17. Houses 524, 522, 520, 518, 516, 512, and 510, were erected by William McIlvain, Sr., Morton C. McIlvain, and William R. McIlvain, or their heirs. The lots upon which they are built constitute a part of the tract described in Finding of Fact 9.

18. The front house wall of 524 Greenwich street is built $4\frac{7}{8}$ " south of the 20-foot restriction. The front house wall of 522 Greenwich street is built $2\frac{3}{4}$ " south of the 20-foot restriction. 522 and 524 are twin houses. They have a joint porch in front. The porch at 524 extends 6'2", and the

porch at 522 extends $6'1\frac{7}{8}"$ over and north of the 20-foot reserve line.

19. The front house wall of 520 Greenwich street is 3' south of the 20-foot reserve line, and that of 518 is $3'1\frac{1}{8}"$ south of the 20-foot reserve line. These two properties have a joint front porch extending over the 20-foot reserve line north at 520, $3'3\frac{1}{2}"$, and at 518, $3'3\frac{5}{8}"$.

20. The front house wall of 516 Greenwich street is $3'2\frac{3}{4}"$ south of the 20-foot reserve line at the east end, and at the west end, where the porch is located, 4'8" south of the 20-foot reserve line. This property has a front porch which extends over the 20-foot reserve line north 3'1".

21. The front house wall of 514 Greenwich street, not erected by the McIlvains or their heirs, but by a subsequent purchaser, is located $3'2\frac{5}{8}"$ south of the 20-foot reserve line. This has a porch along the whole front of the house, extending over and north of the 20-foot reserve line more than 6 feet.

22. The front house wall of 510 and 512 nearest to the reserve line is at one corner $3'3\frac{1}{4}"$ south, and at the other corner $3'5\frac{1}{8}"$ south of the 20-foot reserve line. The porches of these two properties are located, the one at the northeast corner of 512, and the other at the northwest corner of 510, at which places there is a sufficient recess to the south of the main building for the location of these porches. The front line of the porches are in the line with the front wall of the main buildings.

23. William M. McIlvain, Morton C. McIlvain, William R. McIlvain, and their heirs, in the erection of these houses, with front porches attached, constructed the main front wall of the houses to conform with a 20-foot line. These properties were subsequently conveyed with the house buildings made subject, by deed, to this line. The porches were erected without reference to this 20-foot reserve line.

24. This conformity of the house buildings is shown by photograph, plaintiff's Exhibit "C."

25. The appearance of the structure complained of is shown by photograph, plaintiff's Exhibit "E."

DISCUSSION.

Plaintiff, inter alia, asks for a mandatory injunction directed against the defendants to remove a certain structure attached to the northern side of Edward H. Knerr's dwelling house, which structure plaintiff contends is a part of the building, and as such is covered by an agreement containing certain building restrictions to which defendants' property is subject, said agreement having been entered into on June

6, 1914, by plaintiff with Spencer L. McIlvain, predecessor in title to the premises now owned by Edward H. Knerr, one of the defendants. The structure complained of is fully described in our Findings of Fact.

Defendants defend on the ground: First, that even if this structure is a porch, as claimed by plaintiff, and may generally be considered a part of the building, it is not covered by the restriction for the reason that when this agreement was entered into the word "building" was used in a restrictive sense, and had reference only to the main dwelling house, apart from any porch; second, that the structure is not a part of the building, and for that reason it is not included within the restriction.

Spencer L. McIlvain is one of the heirs of William McIlvain, Sr., who, with Morton C. McIlvain and William R. McIlvain, were the original owners of the entire tract of land on the south side of Greenwich street between Fifth and Sixth streets, of which the properties in suit are a part. Plaintiff in his original bill twice sets forth the purpose of this building restriction, where, in paragraph 5 he alleges:

First—"Your Orator's entering into and complying with said agreement was conditioned upon his obtaining from said Spencer L. McIlvain an agreement covenanting for building restrictions similar to those appertaining to the other real estate fronting on Greenwich street."

Second—"It was covenanted and agreed that whereas the parties desired that building restrictions appertaining to all the real estate fronting on the south side of Greenwich street should be the same," etc.

If the purpose of the restriction was as is thus twice stated by the plaintiff, and the agreement effected this purpose, then it is plain that defendants' lot is bound by building restrictions similar to those of all the other properties on the south side of Greenwich street that fronted on Greenwich street; that is, similar to the building restrictions to which Nos. 510, 512, 514, 516, 518, 520, 522, and 524, and the vacant lot adjoining No. 524 on the east are subject.

The purpose of the agreement entered into on June 6, 1914, between Spencer L. McIlvain and Teunis Deelman, plaintiff, is thus stated in the agreement:

"The said parties hereto desire that the building conditions and restrictions along said Greenwich street appertaining to all the said real estate shall be the same throughout."

In plaintiff's first bill he construed the words "along said Greenwich street appertaining to all the said real estate shall be the same throughout" to mean that it included not only plaintiff's and defendants' real estate, but all the real estate on the south side of Greenwich street fronting on said street. He amended the 5th paragraph of the bill by inserting "said,"

so that the one clause now reads "to the said other real estate," etc.; and the other clause reads "to all the said real estate fronting on the south side of Greenwich street," etc. By this amendment he contends that the purpose and the effect of the agreement was merely to make the building restrictions of defendants' and plaintiff's properties the same. Taking into consideration the conditions as they existed at the time that this agreement was entered into, with the agreement itself, especially that part where it provides that the "restrictions . . . shall be the same throughout," we consider plaintiff's first construction to be the proper one. It was only when the Court called attention, after the hearing in this case, that no testimony had been given relating to the building restriction that had been placed upon the real estate fronting on the south side of Greenwich street, that plaintiff amended his bill.

Even if this restricted construction as now contended for is correct, it will be necessary to determine what the restrictions of plaintiff's properties 510 and 512 Greenwich street were under the deed given to him before we can decide what is meant by the word "building" as applied to defendants' property. It seems plain that when the McIlvains, the predecessors in title of the properties fronting on the south side of Greenwich street, made the 20-foot reserve building line, that though they used different words to establish it in the deeds to their grantees, their intent and purpose was to make the building restrictions the same to all properties on the south side of Greenwich street fronting on said street, and included in said restriction plaintiff's properties 510 and 512 Greenwich street. In 13 Cyc, page 714, we have: "In construing covenants or restrictions as to the use of property the circumstances and conditions surrounding the parties and property must be considered as well as the manifest objects of the grant or restriction. So the intent of the parties and the object of the deed or restriction should govern, giving the instrument a just and fair interpretation." In *Murphy vs. Ahlberg, et al., ex'rs*, 252 Pa. 267, on page 269, we have: "The general rule is that the language of a deed should be interpreted in the light of the apparent object or purpose of the parties and of the conditions existing when made: *Meigs vs. Lewis*, 164 Pa. 597." See also *LaBelle Coke Co. vs. Smith*, 221 Pa. 642, 649; *McCloskey vs. Kirk*, 243 Pa. 319, 324; *Landell et al. vs. Hamilton et al.*, 175 Pa. 327; *Equitable Gas Co. vs. Limegrover*, 54 Pa. Superior Ct. 250, 256; *Keiser vs. Reading S. R. Est. Co.*, 43 Pa. Superior Ct. 130, 146; *Thatcher vs. West Chester Street Railway Co.*, 35 Pa. Superior Ct. 615. What was meant by the use of the word building must be determined in view of the circumstances at the time, and the interpretation the parties themselves placed upon it:

Beedy vs. Nypano R. R. Co., 250 Pa. 51, 57; Wright vs. Gas Co., 2 Pa. Superior Ct. 219; Thatcher vs. West Chester Street Railway Co., *supra*.

William McIlvain, Sr., et al., and their heirs, owned this property on the south side of Greenwich street, and built thereon houses with front porches. The front wall of every one of these houses was located south of the 20-foot reserve line. Every one of the front porches, except that to plaintiff's property, extended over this 20-foot restriction for a distance of from 2 to 6 feet. Therefore, when they sold these properties, with the front wall of the house conforming with the 20-foot building restriction, with the porches extending over the 20-foot reserve line, and provided that if the said grantees should rebuild or alter they should stand their building so erected, 20 feet back from the front house line, as in some of the deeds, or as in others, at least 20 feet back from the front house line, or as in another, not less than 20 feet south of the building line of said Greenwich street, it is very evident that only this front wall of the main building was intended,—that is, the "building" restricted was the main dwelling, and did not include the porch. Otherwise you would have this condition: when the necessity for the rebuilding of these wooden porches came, the owners could not rebuild by replacing them in their old positions, but had to place them south of the 20-foot reserve line. This could not be done without removing the front wall of the brick houses.

It was contended by plaintiff's counsel that when the condition of these frame porches became such that they would require rebuilding, the result would be that on account of the brick houses being in the way of rebuilding, these houses, therefore, would have to remain without porches until the brick houses themselves were taken away, or the front walls thereof moved back so as to be able to place a porch again at the front of these buildings. Such an interpretation of the intent of these parties seems to us to be so unreasonable as to hardly admit of serious consideration. It seems clear, by the course of conduct of the prior owners of these properties on the south side of Greenwich street, and by the nature of the reservations that they imposed upon them when they sold them, with the front porches not governed by the restriction, that what was intended was merely to establish this 20-foot reserve line as they in the erection of these houses had themselves observed it, so that to the north of it no main building could be erected. That is, only the front wall of the main house had to be at least 20 feet south of the house line on Greenwich street, and the word "building" is used in the restrictive sense as applying to the main buildings of the respective properties. When, then, 510 and 512 were

conveyed to Teunis Deelman, the word "building" in his restriction applied only to the front line wall of the main building, and this also was the sense in which it was used in the agreement of June 6, 1914. That they so interpreted the word "building" is also shown by the conveyance of William McIlvain et al., on April 22, 1887, of 514, adjoining plaintiff's property on the east, where the words of the restriction are: "It is a part of the conditions that the said Clifford Pomroy shall stand his house back from the street house line in range with the houses Nos. 510 and 512 Greenwich street now erected." This shows that only the house building and not the porch was included. This is further strengthened by the fact that the McIlvains, although still the owners of the properties on both sides of 514,—that is, 516 and 512—permitted the purchasers of 514 to erect the front porch of the house over the 20-foot reserve line. It is consequently immaterial in the consideration of the word "building" whether we take plaintiff's bill as it originally was in paragraph 5, or as amended, because both constructions placed upon it by plaintiff lead to the same conclusion. When all the circumstances attending all the properties on the south side of Greenwich street are taken into consideration, all uncertainties as to the meaning of the word "building" are removed. "In the construction of building restrictions, all doubts are to be resolved against the restriction, and in favor of the free and unrestricted use of the property." *Johnson vs. Jones*, 244 Pa. 386; *McCloskey vs. Kirk*, 243 Pa. 319. In *Willock vs. Arensberg*, 51 Pa. Superior Ct. 73, on pp. 77, 78, we have: "If the uncertain significance of the restrictive words be most liberally construed, they would apply to the main building line, and do not constitute such a restrictive covenant as would forbid a reasonable porch extending but four to six feet beyond the building."

This is a request by the plaintiff for a mandatory injunction. The jurisdiction for a mandatory injunction is not to be exercised except in the clearest cases: *Leisenring vs. Penna. Lighting Co.*, 59 Pa. Superior Ct. 202. Under this view of the case it is not necessary for us to consider defendants' second defense, namely, that the structure complained of is not a part of the building, and, for that reason, is not covered by the restriction of 20 feet.

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT AND FINDINGS OF LAW.

The plaintiff has filed sixteen requests for Findings of Fact and ten requests for Findings of Law. Of the requests for Findings of Fact, twelve are refused, as shown by the answers respectively to said requests, upon the ground either

as not being material to the issue, or as not based upon the evidence. Four are affirmed either in full or in part, as shown by the answers thereto. The first request for Findings of Law is affirmed, and the others are refused.

DEFENDANTS' REQUESTS FOR FINDINGS OF FACT AND FINDINGS OF LAW.

The defendants filed five requests for Findings of Fact. The second and third of these are affirmed in part; the others are refused for the reasons stated in the separate answers to these requests.

They also filed two requests for Findings of Law. The first of these is affirmed in part, and the other is refused, as shown by the answers thereto.

FINDINGS OF LAW.

1. The McIlvains and their heirs, in creating the restriction in their deeds, used the word "building" in a restrictive sense so that it applied only to the house proper. They did not use the word "building" to include the front porches to the houses.

2. The erection by the defendants of the structure complained of by the plaintiff is not prohibited either by the deed of Anne McL. Mickle and John L. Mickle, her husband, to plaintiff, dated June 11, 1914, or by the agreement entered into between the plaintiff and Spencer L. McIlvain dated June 6, 1914.

3. The erection of the structure by defendants does not violate any right of the plaintiff.

4. The bill must be dismissed.

5. The costs of this proceeding must be paid by the plaintiff.

AND NOW, November 23, 1918, the Prothonotary is directed to enter a decree nisi in accordance with the foregoing decision, and forthwith to give notice thereof to the parties or their counsel of record, sec. reg.

COMMONWEALTH vs. MITCHELL.

Criminal Law—Newly Discovered Evidence—New Trial—Practice, Q. 8.

In the consideration of a motion for a new trial on the ground of newly discovered evidence, the Court will make the rule absolute where the legitimate effect of such evidence, if believed by the jury, would require a different verdict. On such a motion the question is (supposing all the testimony, new and old, before another jury), not whether they might, but whether they ought to give a different verdict.

In the Court of Quarter Sessions of Berks County.

No. 112 September Sessions, 1918.

Surcharge assault and battery. Verdict of guilty.

Rule for new trial.

D. E. Schroeder for defendant and rule.

David F. Mauger, Asst. District Attorney, for Commonwealth.

Opinion by Endlich, P. J., November 23, 1918—The defendant was indicted for assault and battery on the prosecutor's child, and convicted. The fact that an assault and battery had been committed was not disputed. The defence was that it was not committed by the defendant, who, it was insisted, was not at the scene of it at all. The only witness who professed to have seen the occurrence was the prosecutor's wife, the mother of the child attacked; and her testimony identifying the defendant as the guilty person is to be judged of in connection with her further statement that immediately after the assault the defendant went into a nearby house occupied by a family by the name of Stewart. If the witness was mistaken in that, she was probably mistaken about the identity of the person who committed the assault and battery. The defendant now offers to show, and submits depositions indicating that she can show, by the persons occupying the house in question that she was not there at all about the time of the assault and battery as alleged by the prosecutor's wife, and she excuses her failure to produce such evidence at the trial by her ignorance of the circumstance that any claim would be made that she had gone to that house. Obviously this is not simply cumulative or corroborative or impeaching evidence, unavailing, under the familiar rule, as newly-discovered evidence warranting a new trial. It may indeed incidentally or indirectly cumulate, corroborate and impeach. But in view of the Commonwealth's evidence just referred to, its main office and direct effect are to deny the identity of the assailant with the defendant and therefore the truth of the charge made against her by proof of her absence from the place where she is said to have been immediately after the assault. Neither is it such evidence as it was imperative upon the defendant to adduce at the trial or be barred from adducing now. If she was not in the Stewart house, she could not have known or surmised that the Commonwealth would allege her entrance into that house, and consequently was not required to be prepared to meet this allegation, but excusable for not meeting it. It is, moreover, evidence which, if submitted to and believed by the jury, ought

to bring about a different verdict. In short, it is sufficient to call for a new trial under the strict doctrine of *Com. vs. Flanagan*, 7 W. & S. 415, 423-4, and numerous cases following it. And this is all the more palpably so when it is remembered that the Commonwealth's case depends upon identification testimony, which by many respectable authorities is deemed to be ordinarily inconclusive and dangerous when standing alone. We think that justice to the defendant demands the granting of a new trial in this case, and therefore—

The rule to show cause is made absolute.

LEBO vs. READING TRANSIT & LIGHT CO.

Negligence—Excessive Verdict—New Trial—Practice, C. P.

1. Where the jury's verdict in an action for damages for personal injuries due to the alleged negligence of the defendant is for a sum that is beyond what is usual and needful for the purposes of compensation for the plaintiff's suffering and pecuniary loss, past, present and future, the Court will order a new trial.

Negligence—Declarations of Employee—Res gestae.

2. Statements and declarations made by defendant's employee immediately after an accident which relate directly to the occurrence and which are essentially connected therewith are admissible as part of the *res gestae* provided that they are statements of fact and not of mere opinion.

Negligence—Contributory Negligence—Action in the Presence of Imminent Danger.

3. A plaintiff cannot be considered guilty of contributory negligence when, through no fault of his own, he is placed in a position imminently dangerous to his immediate safety, even though his actions may not have been guided by the good judgment which under ordinary circumstances would have been necessary.

In the Court of Common Pleas of Berks County.

No. 87 May Term, 1917.

Trespass. Verdict for plaintiff for \$8,000.

Rule for new trial and judgment non obstante veredicto.

C. H. Ruhl for defendant and rule.

Samuel E. Bertolet and Robert Grey Bushong for plaintiff.

Opinion by Endlich, P. J., December 9, 1918.—This is an action for personal injury alleged to have been inflicted on the plaintiff through negligence of the motorman in charge of defendant's trolley car. The jury rendered a verdict for plaintiff of upwards of \$8,000, and the defendant has obtained these rules for a new trial and judgment n. o. v. under Act 22

Apr. 1905, P. L. 286. Defendant having submitted no evidence, every inference favorable to the plaintiff's recovery and capable of flowing from competent evidence in the case is for present purposes to be accepted as drawn by the jury and as correct in point of fact.

On Oct. 12, 1916, about 3.30 p. m., the plaintiff was driving a one-horse baker's wagon with glass front and glass sliding doors, all open, at a slow trot and somewhat down-grade on Robeson street westwardly toward Tenth. He knew that on Tenth street the trolley cars run north. When his horse reached the eastern foot-crossing of Tenth street, plaintiff, sitting in the middle of the wagon, had a view south on Tenth of about 100 feet, the house-line cutting off anything beyond that. He looked south, but saw and heard nothing of an approaching car. Going on without stopping, he then looked north for traffic that might be moving towards him from that side. Seeing none, and still proceeding at a slow trot, and his horse having "reached the track," gotten "almost on the track," plaintiff looked again to the south and saw defendant's car eight or nine feet away coming towards him, indeed, as he says, "practically on top of" him. He reasoned that if he turned south he would "turn into the car," and if he turned north "the car would run into the team," and that his only chance of escape was to go right on, which he did. The trolley car struck the wagon between the front and hind wheels, partly demolishing it, dragging the plaintiff about 30 feet until the car was brought to a standstill, and injuring him painfully and in part probably permanently. The car had not stopped at Spring street, the next street south of Robeson street, nor, as it approached the intersection of Tenth and Robeson streets, was its speed slackened. When plaintiff first looked south the car must have been about half-way between Spring and Robeson streets, and its speed going towards Robeson street was such as to cover a distance of about half a block in the same time in which plaintiff drove about 30 feet. Immediately after the accident, as soon as the plaintiff was gotten from under the car, the motorman said of the occurrence that he could not help it, "the brake didn't hold" or "wouldn't work."

The offer of plaintiff to prove the motorman's statement just mentioned was objected to when made and the admission of it is now complained of as error. It was received as part of the *res gestae*. Among the many cases illustrating the doctrine concerning the admissibility of declarations by an employee as *res gestae* in actions of this kind, it is enough to refer to *Coll vs. Transit Co.*, 180 Pa. 618, where, reversing the *nisi prius* court, it was held, in a case of fatal injury through the alleged negligence of the motorman of the defendant's trolley car, that his declaration immediately after

the accident to the effect that he might have stopped the car in time to avoid the collision, but supposed that a lineman who had jumped from the car and run ahead would remove the deceased from the track (where he had fallen in an effort to get out of the way) before the car reached him, was admissible as part of the *res gestae*, as explained and defined in the opinion of Mr. Justice Fell. There is no conflict between that decision, or the line of decisions to which it belongs, and those which deny the power of an employee to bind his employer by the expression of an opinion that, e. g., the construction or condition of the instrumentality operated by him was defective: see *Steamship Co. vs. Landreth*, 108 Pa. 264; *Shaffer vs. Haish*, 110 id. 575. The present case falls within the principle of the former, not of the latter category of decisions. The testimony touching the motorman's declaration that the brakes on defendant's cars generally were inefficacious was rejected or stricken out, and all that was admitted was proof of his statement that the brake of this car, when he applied it, failed to hold,—a statement of fact, not an opinion,—and one which related directly to the occurrence at the time and was essentially connected with it as part of the *res gestae*. That it had a bearing on the question of defendant's negligence need not be pointed out.

Nor is there a lack of other evidence of negligence on defendant's part. If the plaintiff had a view south of 100 feet from the foot-crossing, it may be inferred that the motorman could see and ought to have seen the plaintiff going on towards the track when they were considerably more than 100 feet apart. That the motorman did in fact see the plaintiff is involved in his statement about trying to stop the car. The plaintiff's going on at a trot may have been notice to the motorman of plaintiff's intention to go on and cross the track without stopping (see *Callahan vs. Traction Co.*, 184 Pa. 425, as explained in *Smith vs. Traction Co.*, 187 id. 110, 112). If so, the motorman was of course bound to guard against a collision if he could. But when it comes to the inquiry what his precise duty in the premises was, it cannot be laid down as a matter of law that he was obliged to bring the car to a standstill the moment he saw the plaintiff, or at any given point of time or place. Indeed there is, as in most cases, no rule of law to be applied by the Court, to ascertain what the motorman should have done, if anything. Possibly the situation, as it presented itself to him, demanded of him no more than the sounding of the gong, which from plaintiff's testimony that he heard nothing it would appear deducible was not done. Possibly something more was required from the motorman in the exercise of due care. Manifestly it must be for the jury to determine whether he fell short of performing his whole duty in approaching the intersection of Tenth and Robeson

streets as he did, in the face of imminent danger of collision: see *Mead vs. Traction Co.*, 54 Pa. Super. Ct. 400, 405; 63 id. 76, 78, 81, and also *Ry Co. vs. Boudrou*, 92 Pa. 475, 481.

And so was the question of plaintiff's contributory negligence one for the jury. There is no room for doubting the imperativeness of the rule that one about to cross a street railway is bound to look for danger and keep up his vigilance all the way to and upon the track, and that failure to do so is negligence per se. This is settled by a great number of decisions, among which may be mentioned *Ehrisman vs. Ry. Co.*, 150 Pa. 180; *Wheelahan vs. Traction Co.*, *ibid.* 187; *Darwood vs. Traction Co.*, 189 id. 592; *Burke vs. Traction Co.*, 198 id. 497; *Pieper vs. Traction Co.*, 202 id. 100; *Keenan vs. Traction Co.*, *ibid.* 107; *Moser vs. Traction Co.*, 205 id. 481; *Smathers vs. Ry Co.*, 226 id. 212; *Talley vs. Traction Co.*, 227 id. 393; *Ervay vs. Traction Co.*, 240 id. 440; *Moses vs. Ry Co.*, 258 id. 537; *Clift vs. Traction Co.*, 52 Pa. Super. Ct. 502; *Storage Co. vs. Traction Co.*, 62 id. 568; *Bready vs. Transit Co.*, 68 id. 298. He may even be bound to stop, if that is necessary for safety; see *Omslaer vs. Traction Co.*, 168 Pa. 519; *Speakman vs. Traction Co.*, 42 Pa. Super. Ct. 558. But there is no fixed and invariable duty upon him to stop and listen, as well as look. Whether a necessity for that existed in any given case is for the jury under all the circumstances,—with this qualification, that, on the one hand the jury cannot hold a party to a higher standard of care than the law requires, and cannot find anything to be negligence which is less than a failure to discharge a legal duty: *Brague vs. Ry Co.*, 192 Pa. 242, 251, and that, on the other hand, what the law calls negligence the jury cannot call something else: *Gangawer vs. R. R. Co.*, 168 id. 265, 270. The plaintiff in this case looked south when he was about 30 feet from the track. It was his duty to look north also, and he did so. Then he looked south again. In the meanwhile he was approaching the track on a slow trot. It cannot have taken him more than a few moments to reach it. Virtually he may have been busy looking one way or the other all the time he was going towards the track. At any rate, it can hardly be declared as a matter of law by the Court that he did not keep up his vigilance right along until he reached the track. Then when he looked south the second time and saw the car "practically on top of" him, he, as his testimony ought perhaps to be regarded as fairly suggesting and the jury as entitled to believe, may have become bewildered or confused by the imminence of the peril about to overwhelm him and have chosen what at the moment seemed to him to promise most in the way of escape, i. e., to keep going. If in so doing his judgment may not have been the best, yet it is to be remembered that, in a sudden emergency not brought about by something wrong in the party's own conduct, he is not held

to the same good judgment as ordinarily, and whether what he did or did not do under such conditions ought to be imputed to him as negligence or not becomes a question for the jury. This was held in *Bard vs. Ry Co.*, 199 Pa. 94, and has been held so often and at least as lately as *Wingert vs. Ry Co.*, 262 id. 21, that it is unnecessary to enumerate the cases.

It would seem that, in the matters treated of there is not enough to warrant the granting of a new trial and too much to permit the entry of judgment non obstante veredicto. There remains defendant's objection founded upon the size of the verdict. It must be conceded that it is beyond what is usual and beyond what appears needful for the purposes of compensation for the plaintiff's suffering and pecuniary loss, past, present and future. A careful examination of the case, however, has led to the conclusion that this objection cannot properly, and therefore ought not to be attempted to, be remedied by the Court reducing the verdict. In order to justify that there ought to be an adequate basis in the evidence for it affording a safe measure of reduction: see *Stauffer vs. Reading*, 208 Pa. 436, 437. The evidence here does not furnish that basis and measure for a reduction, and the latter would appear as, and could hardly be other than, an arbitrary act on the part of the Court. Moreover, it must not be overlooked that in an action like this a plaintiff on the question of his damages has the constitutional right to have them assessed by a jury: *Bradwell vs. Ry Co.*, 139 Pa. 404, subject to the power of the Court to set aside the verdict if clearly too great or too small. We are of opinion that in this instance the ends of justice will be best served by the submission of this case to a second jury. Further discussion of it at this time with reference to the quantum of the damages is therefore inadvisable: see *McKnight vs. Bell*, 135 Pa. 358, 373.

The rule for judgment n. o. v. is discharged and the rule for a new trial is made absolute.

COMMONWEALTH vs. WEIMERT.

Criminal Law—Fornication and Bastardy—New Trial.

After conviction on the charge of fornication and bastardy, a new trial will be granted where the verdict is palpably contrary to the evidence and the weight of the evidence, and unjust to the defendant.

In the Court of Quarter Sessions of Berks County.

No. 63 June Sessions, 1918.

Surcharge fornication and bastardy. Verdict of guilty.

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BERKS COUNTY
LAW JOURNAL

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VOL. XI

CONTAINING CASES DECIDED BY THE

Courts of Berks County
Pennsylvania

REPORTED BY
RANDOLPH STAUFFER
AND
WELLINGTON M. BERTOLET
MEMBERS OF THE BERKS COUNTY BAR

521 COURT STREET, READING, PA.
OCTOBER 1st, 1919

JUDGES
OF THE
COURTS OF BERKS COUNTY

During the period of these reports.

COURT OF COMMON PLEAS

GUSTAV A. ENDLICH..... President Judge
GEORGE W. WAGNER Judge

ORPHANS' COURT

HARRY D. SCHAEFFER President Judge

District Court of the United States for the Eastern District of
Pennsylvania.

SAMUEL E. BERTOLET, Referee in Bankruptcy.

OCT 19 1920

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No 1.

BOYD'S ESTATE.

Decedents' Estates—Widows Election to Take Against the Will—Act 21, April 1911, PL 79.

The mere fact that there may have been undue delay by a widow in electing to take against her husband's will, does not forfeit the right. Where the settlement of an estate has not been delayed or interfered with, and no intervening rights, which may have accrued, will be disturbed, and no injury will result to the parties interested in the estate, mere lapse of time will not deprive the widow of her right to election.

Decedents' Estates—Direction to Pay a Specific Debt—Devises.

Where a decedent gives his whole estate to his wife, and also directs, "the amount owed by me to my mother, Emma R. Boyd, must first be paid, if any of the said amount remains unpaid at the time of my death," the language is not definite enough to inform the devisee what amount she would have to pay, if she would accept the devise. Under these circumstances, the mere fact that considerable time elapsed before the election was made, does not prevent or estop the widow from electing to take against the will.

One is not bound to elect until he is fully informed of the relative value of the things he is to choose between; and if he makes an election before the circumstances necessary to a judicious and discriminating choice are ascertained, he will not be bound.

In the Orphans' Court of Berks County.

Exceptions: Of Emma R. Boyd to the widow's appraisal—made under the Act of April 1st, 1909.

Opinion by Schaeffer, P. J., September 28, 1918.—Guy M. Boyd, a resident of the City of Reading, died on December 13th, 1915, leaving his last will and testament, wherein he gave his whole estate to his wife Dora Boyd, and also directed, "She to pay all just claims and bills held against me. The amount owed by me to my mother, Emma R. Boyd, must first be paid if any of the said amount remains unpaid at the time of my death." Letters of administration c. t. a., were granted to Dora Boyd, the decedent's widow on October 3d, 1916. On February 2d, 1917, Emma R. Boyd, the exceptant, brought suit in the Court of Common Pleas against Dora Boyd as administratrix and individually; and on April 11th, 1918, she recovered a verdict against Dora Boyd, as administratrix, for the sum of \$3,225. On April 19th, 1918, Dora Boyd, the widow, filed her election to take against the will of her hus-

band, the decedent, claiming the widow's exemption of \$300, and also \$5,000 under the Act of 1909 and its supplements. Appraisements setting apart the widow's exemptions were made and filed, whereupon exceptions were filed by Emma Boyd, the mother of the decedent.

In the \$300 appraisalment, appears an item, "cash \$112.25," and in the \$5,000 appraisalment there is an item, "cash from Rajah Temple balance \$398.15." These items are excepted to on the ground that the money included in them, is the property of Emma R. Boyd, the exceptant. Counsel for the widow has asked, that since there is a dispute as to ownership of this particular money, these items might be eliminated from the appraisalment, and the same confirmed accordingly. This is to be done without prejudice to the widow, to contest the allegations set forth in the exception, in a proceeding to establish the ownership of the money. The second and third exceptions to the \$5,000 appraisalment are as follows:

"2. The election to retain real estate of the said Guy M. Boyd, situate on the northeast corner of Sixteenth and Haak streets, in the City of Reading, and its appraisalment thereof, are excepted to for the following reasons, to wit: exceptant is a creditor of the said Guy M. Boyd in the sum of \$3,000, with interest from October 6th, 1915, and brought suit in the Court of Common Pleas of Berks County, to No. 85 February Term, 1917, and on April 11th, 1918, recovered a verdict against the said Dora Boyd, administratrix c. t. a., of Guy M. Boyd, deceased, in the sum of \$3,225. This verdict remains unsatisfied.

"That said Guy M. Boyd left his last will and testament, a copy of which is hereto attached, marked Exhibit A, wherein he gave all his property, real and personal to his wife, Dora Boyd, and directed that she pay all just claims and bills held against him, and specifically directed that 'the amount owed by me to my mother, Emma R. Boyd, must first be paid, if any of the said amount remains unpaid at the time of my death.' That said will was duly presented by the said Dora Boyd for probate to the Register of Wills of Berks County, on October 3d, 1916, and for letters of administration cum testamento annexo, copy of her said petition being hereto attached, marked Exhibit B. That letters of administration cum testamento annexo of said Guy M. Boyd, deceased, were granted to her, the said Dora Boyd, who thereupon qualified as such administratrix, a copy of her affidavit being hereto attached, marked Exhibit C, the will remaining of record in the office of the Register of Wills of Berks County, in Will Book No. 29, page 393.

3. That said Dora Boyd, widow of said Guy M. Boyd, deceased, having proved the will of said Guy M. Boyd ac-

cepted letters of administration thereon, qualified as administratrix of his estate, used property which she claimed as belonging to his estate, is estopped from electing to take against the will of her said husband, and particularly against exceptant who proceeded to suit, trial, and a verdict in her favor, on a just claim recognized by the said Guy M. Boyd in his said will, and directed by him in said will to be paid."

These exceptions in substance are, that this appraisement should not be confirmed because the verdict of \$3,225 secured by exceptant remains unsatisfied, and because the widow, by her actions and delay is estopped from claiming against the will at this late date. We will first examine the question, whether there is anything in the law or the facts connected with the settlement of this estate, which prevented the widow from taking against the will at the time she did? It appears that her election in writing was made on April 11th, 1918, one year, six months and eight days after the letters of administration were issued. The Act of April 21st, 1911, P. L. 79, prescribes the procedure to be followed in making an election to take under or against the wills of decedent. This Act of Assembly fixes no time within which the election must be made. It merely provides that where there has been a neglect or refusal to elect within the time prescribed by the order of the Court, that a certified copy of the final decree of the Court shall be recorded. The penalties prescribed in Section 2 and Section 3 of this Act, for not making an election are: the non-participation in the distribution of the estate and fixing of the rights of the parties by the Court where there has been a neglect or refusal to take.

Since the Act specifies no time within which the election must be made, it naturally follows, that the law contemplates that a reasonable time shall be allowed within which this right may be exercised. The mere fact that there may have been undue delay in making an election, does not forfeit the right. Unless parties are injured, mere delay has never been held to deprive a widow of the right of election. And where the settlement of an estate has not been delayed or interfered with, and no intervening rights, which may have accrued, will be disturbed, and no injury will result to the parties interested in the estate, mere lapse of time will not deprive the widow of her right to election. However, if any one is induced to take action toward the estate, either by the conduct or neglect of the surviving spouse to make an election in a reasonable time, such spouse will not be permitted to exercise such right. if by doing so, it would do injustice to the party who acted in pursuance of such conduct or neglect.

The exceptant contends, that the widow, after taking out letters of administration, evidenced by her actions her

purpose to take under the will; and that she repudiated this action and took against the will, only when she discovered that the verdict of \$3,225 against the estate, would have to be paid by her if she took under the will. There is no evidence to prove that the widow knew or had means of knowing the amount due by the decedent to the mother. It was only after suit was brought on a note, which on its face was barred by the statute of limitations, and a verdict recovered, that the amount of indebtedness became definitely fixed. Up to this time the widow did not know the true value or status of the estate and consequently was not in a position to make an intelligent election. She had the right to know what burdens she was assuming, if she took under the will, and this fact could only be determined in the way it was, namely, by a suit at law. The language of the will, referring to the payment to be made to the mother of "the amount owed by me," can hardly be said, to be definite enough to inform the devisee what amount she would have to pay if she would accept the devise. Under these circumstances, the mere fact that considerable time elapsed before the election was made, does not prevent or estop the widow from making such election: *Anderson's Appeal*, 36 Pa. 476-496; *Boileau's Estate*, 201 Pa. 493. Exceptant also argues, that the widow is estopped, because she took out letters of administration and used the property belonging to the estate. The granting of letters of administration to the widow, does not bar the widow from claiming her rights under the law. The occupancy of the real estate by the widow does not necessarily deprive her of the right to make an election against the will, in view of the developments in this estate. In *Anderson's Appeal*, supra 476, the actual leasing of the real estate devised to the widow was in itself not to be regarded as an election by matter in pais. One is not bound to elect until he is fully informed of the relative value of the things he is to choose between; and if he makes an election before the circumstances necessary to a judicious and discriminating choice are ascertained, he will not be bound: *Anderson's Appeal*, supra, p. 496.

We think that in view of the facts appearing in this case, the widow had the right to make an election at the time it was made, and consequently in the exercise of this right she can take whatever the law would give her in the case of an intestacy. Exceptant has asked us in case we should determine that the election was valid, to withhold confirmation of the appraisement, because the property included in the appraisement is subject to the lien of a judgment for \$3,225, which remains unpaid. Since the widow takes the property subject to the payment of the debts, we do not see why the appraisement should not be confirmed at once.

To refuse to confirm the appraisement until the judgment is paid, would be unfair to the widow, because we do not know when the judgment creditor will move to collect his judgment, or whether his right to do so will go undisputed. The fact that there are debts does not effect the appraisement, for the widow will take the property covered by the appraisement subject to the liens, if there are any: Gilbert's Estate, 227 Pa. 648.

The exceptions are all dismissed, and the two appraisements, after eliminating the amounts of \$112.25 and \$398.15 therefrom, are confirmed absolutely.

BOLIG'S ESTATE.

Decedents' Estates—Claim for Nursing and Boarding.

Where a claim is made by a son-in-law, against the estate of his mother-in-law, for nursing and boarding decedent, without proof of a contract to pay for same, and it appears that other sons of the decedent had nursed and boarded her without charge for equal periods of time, the presumption is strongly against the existence of any such relation as will justify the inference of an implied contract.

In the Orphans' Court of Berks County.

Adjudication: Claim of Frank H. Kegerise.

George J. Gross for claimant.

H. Robert Mays for accountant.

Opinion by Schaeffer, P. J., September 28, 1918.—Frank H. Kegerise, a son-in-law, presented a claim against the estate, upon a quantum meruit, for nursing and boarding decedent from Aug. 31, 1916, to October 12, 1917, which includes the last illness. The period covered by the claim is four hundred days, and claimant suggests a fair allowance to be \$400, or \$1.00 per day. The objection is, that there was no special contract between the parties.

The Court has no doubt from the testimony presented, that the claimant rendered services. It is also clear that the services were not only continuous for the period claimed, but of an onerous and disagreeable character. When testatrix died, she was seventy years of age, had been blind, and suffering from paresis. As a result of her impaired mental condition, she required constant watching, and being blind, of course, made her utterly helpless without much personal attention to her needs on the part of some one. Besides all this, it was testified by the attending physician that she had lost control of her bowels and bladder; and this added to the

general unpleasantness of the situation for those having charge of her. This testimony is undisputed; and in the Court's mind it leaves no question that to the Kegerise family, in the latter days of her life, testatrix was a great care and burden.

It was also testified, however, that when testatrix took sick in 1916, she happened to be in the Kegerise home as a result of her habit of dividing her time among all of her children. For some years prior to her last illness, her custom had been to visit the homes of her children, remaining with each for periods of more or less duration, and paying nothing for nursing and boarding. John F. Bolig, one of the sons, testified that immediately following his father's death, testatrix had lived with him for over two years; she had also left his home for her last visit to the Kegerise home. Harry and Joseph Bolig, two other sons, testified that during the several years before her death she had also lived in their homes. None of these witnesses charged testatrix anything for her maintenance.

It is owing to this latter state of facts—that at some time or other each of the children maintained their mother without charge—that the objection to this claim arises; and the Court thinks the objection must be sustained on the following language in *Gery vs. Weber, et al.*, 151 Pa. 396:

"The undisputed facts of the case appear to bring it within the principle of *McHenry's Appeal*, 1 Adv. R. 689, in which it was held that a son-in-law cannot recover for nursing, etc., of his mother-in-law where it appears that the decedent, an aged woman, had for years divided her time between her son and daughter, wife of claimant, living with each of them, at stated intervals, as a member of their respective families, without paying or agreeing to pay for such care and attention as her age and the state of her health required. In such cases the presumption is strongly against the existence of any such relation as will justify the inference of any implied contract: *Hauck vs. Hauck*, 99 Pa. 552; *Patton vs. Conn*, 114 Pa. 186."

The claim, therefore, must be disallowed.

HECKMAN vs. HECKMAN.

Judgments—Rule to Open—Lien on Subsequent Indebtedness—Affect on Innocent Third Party—Question for Jury.

1. Whilst as between the original parties a judgment confessed by the one to the other may by their agreement be made to stand for subsequently arising indebtedness, this cannot be done to the prejudice of innocent third parties.

2. Whether or not there has been an agreement by which a third party could be affected, and whether or not the indebtedness represented by the confessed judgment arose from transactions or advances which the judgment was originally intended to stand for are questions for the jury.

In the Court of Common Pleas of Berks County.

No. 54 April Term, 1914, J. D., No. 8 February Term, 1918, E. D.

Rule to open judgment.

Joseph R. Dickinson for Plaintiff and Rule.

W. Kerper Stevens for Defendant.

Opinion by Endlich, P. J., October 7, 1918—In the fall of 1913 the defendant made some alterations to a property then owned by him, for which he needed money. The plaintiff, his brother, agreed to advance what the defendant required, the latter to secure him by confession of a judgment in his favor. The judgment eventually settled upon was for \$2,000, plus \$100 attorney's collection fee, and was accordingly entered for \$2,100 to No. 54 Apr. T., 1914. Partial payments reduced this amount, as plaintiff concedes, to \$2,068.50, (including collection fee), but as defendant insists, to \$1,600. About the time of the confession and entry of the judgment a promissory note for \$2,000 was given by the defendant to the plaintiff for the same debt as the judgment, which note was admittedly reduced by partial payments to \$1,600. That amount was offered to the plaintiff in satisfaction of the judgment, but refused by him. An execution issued by him upon the judgment for \$2,068.50, with interest, was levied on the property referred to. In the meanwhile, on June 17, 1916, that property had been conveyed for a good and valuable consideration to defendant's wife, Daisy Wisser Heckman, and she is now here asking to have the judgment opened in order to ascertain how much is due on the same. Upon her petition this rule was granted. The question in controversy between the parties is whether the judgment stands for \$2,068.50 or only for \$1,600.

As already stated, the reduction of the \$2,000 promissory note to \$1,600 is undisputed. But the plaintiff holds another note originally for \$377.47, now reduced to \$370, first given on Nov. 9, 1916, i. e., subsequently to the above-mentioned conveyance of the property; and it is the contention of the plaintiff that the judgment is to be treated as covering that promissory note, or the indebtedness it represents, as well as the larger one. It admits of no doubt, under *Peirce vs. Black*, 105 Pa. 342; *Bank vs. Mosser*, 161 id. 469; *Weiskircher vs. Volk*, 29 Pa. Super. Ct. 611, and similar cases, that as between the original parties a judgment confessed by the one to the

other may by their agreement be made to stand for subsequently arising indebtedness. But the same cases are authority for holding that this cannot be done to the prejudice of innocent third parties. Whether the \$370 note is covered by the judgment or not would seem to depend upon whether or not there has been an agreement to that purpose by which the petitioner could be affected, or whether or not the indebtedness it represents arose from transactions or advances which the judgment was originally intended to stand for; and these are apparently questions of fact the decision of which is peculiarly within the province of a jury. It follows that this rule should be made absolute and the petitioner given an opportunity to show just what and how much is really due upon the judgment to the plaintiff. The alleged agreement between the defendant and Daisy Wisser Heckman whereby he was to assume the payment of the judgment cannot, of course, be regarded as in any way concerning the plaintiff.

It is needless to discuss the suggestion of irregularities in the conduct of the execution. The main application here is to open the judgment, and the granting of that application necessarily affords all the relief the petitioner seeks in this proceeding.

And now, Oct. 7, 1918, the rule to show cause why the judgment should not be opened is made absolute, and all further proceedings in the cause are stayed until that matter is disposed of.

CALTON MANUFACTURING CO. vs. PROSPECT DYE WORKS.

Affidavits of Defence—Liens—Dyers' Lien—Act 20 May, 1913, P. L. 271.

1. In an action of replevin, the affidavit of defence disclosed that O., being in possession of property belonging to the plaintiff as its bailee, transferred it for a specific purpose to the defendant under an arrangement with defendant making the property liable in defendant's hands to the latter's claims generally against O., and this without the assent or knowledge of the plaintiff, who was a stranger to the transactions between O. and the defendant. **Held:** the affidavit is insufficient to prevent judgment.

2. The Act 20 May, 1913, P. L. 271, in giving dyers a lien for pending accounts seems to have reference to accounts between them and the owner, and to apply only where work, labor or materials were furnished by the dyers in the treatment of the goods for the owners.

In the Court of Common Pleas of Berks County.

No. 58 June Term, 1918.

Rule for judgment of insufficient affidavit of defence.

H. F. Kantner for Plaintiff and Rule.

J. A. Keppleman for Defendant.

Opinion by Endlich, P. J., October 7, 1918.—According to the averments of the plaintiff's declaration in this case, it, during the latter part of 1917, shipped a quantity of unfinished hosiery to one Oaks in the city of Reading with a view to having him dye and finish the same in accordance with the terms of a contract previously entered into between him and the plaintiff, which reserved to the latter all title in the goods, Oaks to be paid a stipulated amount for work actually performed thereon after the completion of the same. Oaks received the shipment, and without the knowledge or consent of the plaintiff delivered a portion of the hosiery to the defendant for the purpose of having it dye the same. The defendant did not do so, indeed performed no work of any kind or character on the hosiery, but held the same from the time of its receipt from Oaks, awaiting further instructions relative thereto from him. A demand upon the defendant by plaintiff for surrender of the hosiery being refused, this action of replevin was instituted by plaintiff to recover it.

The affidavit of defence does not deny these allegations of the declaration, but avers that Oaks represented to the defendant that the hosiery was his property and that the dyeing should be done for and on account of Oaks, with the further understanding that the hosiery should be subject to a general lien in favor of defendant, not only for the dyeing thereof, but also for the amount of former accounts arising in the usual course of business between defendant and Oaks and owing by Oaks to the defendant, which ran up to about \$600.

Because of this alleged lien, the Prospect Dye Works claims the right to hold the hosiery against the plaintiff, its real owner. As was said in *Evans vs. See*, 23 Pa. 88, 91, where a result contended for is contrary to a clear dictate of natural justice, it is needful to look closely into the reasons assigned in support of it. It is undoubtedly true that the dyer who receives goods from their owner under a special contract that they shall be subject to a general lien, not only for the dyeing and finishing thereof, but also for a balance due upon a previous account representing dyeing done in the usual course of business between the parties, may have a lien for the amount of such account on the goods so received, though no work was done upon them: see *Firth & Foster Bros. vs. Hamill*, 167, Pa. 382; *Hecht vs. Dye & Finishing Works*, 66 Pa. Super Ct. 97. But this rule, as appears from the very decisions cited as well as from others, has to do with arrangements of the description indicated made

between the owner and the dyer or by a third person with the owner's knowledge and assent, express or implied; and where made by a third party, unless brought home to the owner in a way warranting an inference of his consent, does not bind him: *Meyers vs. Bratespiece*, 174 Pa. 119. So far as the plaintiff here is concerned, the affidavit of defence (which is made to the declaration: *Ashman vs. Weigley*, 148 Pa. 61, 63; *Wanner vs. Eman. Church*, 174 id. 466, 470), does not set up any assent or knowledge on plaintiff's part in respect to what occurred between Oaks and the defendant Dye Works; and what is not averred in an affidavit of defence is taken not to exist: *Kaufman vs. Iron Co.*, 105 Pa. 537, 542. Hence the principle stated can hardly be looked upon as here controlling. Taking the affidavit and the admitted or undenied averments of the declaration as verity, the situation presented resolves itself into this, that Oaks, being in possession of property belonging to the plaintiff as its bailee, transferred it for a specific purpose to the defendant under an arrangement with defendant making the property liable in defendant's hands to the latter's claims generally against Oaks, and this without the assent or knowledge of the plaintiff, and that the defendant is now seeking to hold on to that property against the plaintiff, with whom it had no dealings or privity, and who is a stranger to the transactions between and the relations of Oaks and the defendant. It may further be noted that the Act 20 May, 1913, P. L. 271, in giving dyers a lien for pending accounts due them seems to have reference to accounts between them and the owners of the goods and owing by such owners, and to apply only where work, labor or materials were furnished by the dyers in the treatment of the goods for the owners. There is no pretence here that the past-due accounts for which a lien is claimed arose from the treatment of goods belonging to plaintiff, and the declaration avers, and the affidavit of defence does not deny, that no work, labor or materials were furnished by defendant in or about the hosiery it insists upon retaining by virtue of its supposed lien. It would appear to follow that the affidavit does not go far enough to prevent summary judgment, and therefore—

The rule to show cause is made absolute.

RANK vs. TOWNSHIP OF ROBESON.

Negligence—Steam Road Roller—Sparks—Fires—Circumstantial Evidence.

In an action for damages for property destroyed by a fire alleged to have been caused by the negligent operation of a steam road roller, the case is for the jury and a verdict for the plaintiff will be sustained where the evidence shows that the road roller was in close proximity to the property destroyed, that the wind was blowing directly towards it, that the roller had no spark arrester, that from 15 to 30 minutes before the fire was discovered the roller started up a hill close by the property, and that there was no other source of explaining the origin of the fire.

In the Court of Common Pleas of Berks County.

No. 38 January Term, 1917.

Trial and verdict for Plaintiff.

Rule for Judgment non obstante veredicto.

Lee Friday and Joseph R. Dickinson for Defendant and Rule.

S. M. Meredith contra.

Opinion by Wagner, J., October 7, 1918—Plaintiff brought this action against the defendant to recover damages on account of the destruction by fire of a combined wagon house, garage and carriage shed, together with the contents thereof, which she alleged was caused by defendant's negligence. The negligence charged is that the defendant in a careless and negligent manner operated its steam road roller which was not equipped with a spark arrester and guard so that sparks of fire and other inflammable material fell upon plaintiff's property setting fire thereto and destroying it.

In the course of the trial three questions arose: (1) whether the steam road roller which was alleged to have caused the fire was at the time in the control and possession of the defendant; (2) whether the fire originated from the steam road roller, and (3) whether defendant was negligent.

At the argument of the case defendant admitted that the question of ownership and control of the road roller was for the jury. It, however, contended that there was no evidence to sustain the jury's affirmative findings on the second and third questions.

The evidence showed that on April 20, 1916, at about 1.30 P. M. the supervisors of the township proceeded with a steam road roller from Joanna Station westward towards Reading. After going westward for about half a mile, they came to a cross road running north and south from Geigertown to Morgantown. The destroyed building was located on the Geigertown road about 30 feet north of the northwest corner of the intersection. When they came to the cross road

they backed the steam roller down alongside of the carriage shed which was the portion of this combined building lying immediately along the Geigertown road. They did this for the purpose of hooking on to the steam road roller a scraper that was lying on a triangular piece of ground immediately to the north of the building. After the scraper was attached to the road roller they then proceeded to the public road from which it had backed and went on towards Reading. Within a quarter to a half an hour after this, fire was discovered on the roof of that portion of the building designated as the carriage shed and was then already in a considerable blaze. The steam road roller was not provided with a spark arrester. Mr. Sanders testified that it backed down along the side of the carriage shed with the hind wheel "right in there at the corner," that it was "partway in the grass, kind of slanting towards the shed." One of defendant's witnesses stated that it was within eight feet of the carriage shed. On that day, as one of the witnesses testified, a fair wind was blowing, or, as Mr. Sanders said, "it was a pretty windy day, the wind was blowing from the east." This he knew because the wind blew the phosphate from the drill which he was following into his face. The Geigertown road from the carriage house to the road leading to Reading had a slight upward grade.

In *Kriebel vs. Worcester Twp.*, 253 Pa. 452, on page 455 it is stated: "Although the absence of a spark arrester is not in itself evidence of negligence, it may be a factor in determining whether or not negligence on the part of the owner of the engine existed under given circumstances."

The question then is whether, in view of the fact that this engine did not have a spark arrester, there was a negligent operation of it in running it on a windy day down right alongside of this building with the wind blowing directly from the engine toward this building; this to be taken in connection with the additional circumstances of running it off of the main road on to the grass, attaching thereto the road scraper, and then proceeding along a slight up grade to the Reading road, thus requiring greater power to propel the road roller and therefore making more probable the emission of sparks from the engine. These combined circumstances were sufficient to sustain the negligence charged against the defendant and to explain the origin of the fire. There is no evidence of any other fire near this place at the time the building was destroyed. Brush had been burned in the orchard at a distance, according to the scale of the draft, of more than 200 feet north of this shed. This had happened earlier in the day and at the time of the burning of the shed was practically extinct. The road roller in this close proximity

to this building, the wind blowing right directly towards it, the extra force required to propel the roller, the well known fact that sparks are emitted from engines: *Henderson vs. Phila. Etc. R. Co.*, 144 Pa. 461-476; *Kriebel vs. Worcester Twp.*, 253 Pa. 452-455; *Derminer vs. N. Y. Cent. & Hudson River R. R. Co.*, 42 Pa. Sup. Ct., 541; the location of the carriage house where the fire originated right at the place where the road roller had been, the discovery of the fire within 15 to 30 minutes after the road roller left—all reasonably point to the conclusion that the burning of the building was caused by sparks of fire emitted from this steam road roller. The fact that no one saw sparks emitted from the road roller does not determine this case against the plaintiff. The time was around 2 o'clock P. M. when "the air may be full of live sparks . . . and yet the eye cannot detect them." *John Hancock Ice Co. vs. Perkiomen R. R. Co.*, 231 Pa. 117-121; *Wagener vs. P. & R. R. Co.*, 235 Pa. 539-562.

The rule for judgment n. o. v. is discharged.

**COMMONWEALTH, for use of JENNIE HAGEMAN vs.
MILTON HAGEMAN, defendant, and BERKS
COUNTY TRUST CO., Garnishee.**

Wills—Gifts—Intention—Vested Gift.

1. A gift of the income of a fund without limitation as to time is a gift in perpetuity, and becomes the fund itself.

2. Where there is no bequest over, and no restriction to the life of the first taker, the gift is absolute.

3. Where it is plain that the intention of the testator was to give the entire beneficial interest of a bequest, the fact that he withheld the enjoyment of the principal until the legatee should demonstrate his ability to accumulate property, in no wise affects the question of intention.

4. Where a testator directs that his estate be divided into five equal shares, giving one of them to each of his four daughters "absolutely" and "to my son Milton one equal fifth part thereof," and then adds, "the four daughters above named shall each receive their share absolutely, the share given to my son Milton shall be given to the Berks County Trust Co., of Reading, Pa., for the purpose of being invested by them, the interest thereof shall be paid annually unto my son Milton, and if, at the expiration of ten years after my decease, he shall be able to demonstrate that he has accumulated, or acquired any property of value, then the principal shall be paid to him absolutely," and there is no bequest over, no restriction of the legacy to the life of Milton, and no limitation as to time, the gift to Milton is vested and, therefore, liable for his debts.

In the Court of Common Pleas of Berks County.

No. 46 December Term, 1917.

Rule for Judgment on Garnishee's Answers.

Caleb J. Bieber for Plaintiff and Rule.

F. A. Marx for Garnishee.

Opinion by Endlich, P. J., October 7, 1918—In the Court of Quarter Sessions of this county, the defendant, Milton Hageman, was ordered to pay a weekly amount for the support of his two children. He failed to keep up the payments until now his arrearages have reached the sum of \$451.50. For that sum, with interest from Nov. 13, 1917, judgment was entered against him to No. 20 Nov. T. 1917, J. D., and thereupon this attachment execution was issued, summoning as garnishee the Berks County Trust Co., which has in its hands the sum of \$525 as principal, and \$24.24 interest thereon, under the will of Joseph H. Hageman, the father of Milton Hageman. There is no dispute as to the liability of the interest to seizure by this process; but its efficacy to take the principal is denied. The question thus presented arises under, and is to be resolved by reference to, the will of Joseph H. Hageman, who died in 1905.

After giving a number of directions and specific bequests, etc., the will disposes, in the 10th paragraph, of "all the rest, residue and remainder" of the testator's estate, dividing it into five equal shares and giving one of them to each of his four daughters "absolutely" and "to my son Milton one equal fifth part thereof," and then adds:

"The four daughters above named shall each receive their shares absolutely. The share given to my son Milton shall be given to the Berks County Trust Co. of Reading, Pa., for the purpose of being invested by them, the interest thereof shall be paid annually unto my son Milton, and if, at the expiration of ten years after my decease, he shall be able to demonstrate that he has accumulated or acquired any property of value, then the principal shall be paid to him absolutely."

There is here first of all an unconditional gift to Milton. If the provision for him stopped with the words "to my son Milton one equal fifth part thereof," there would hardly be any room for doubting that his interest in the share set apart for him was a complete and absolute one. But it is well settled by the decisions: see *Sheets's Est.*, 52 Pa. 257; *Krebs's Est.*, 184 id. 222; *Spring's Est.*, 216 id. 529, that an absolute interest given by a will may be cut down to a qualified one by directions occurring subsequently in the same, which unequivocally show that the testator means the legatee to take a lesser interest only; and it is urged that that is what we have here. The testator expressly declares that the daughters shall receive their shares "absolutely," but in the gift to Milton omits that word and then puts Milton's share in the hands of the Trust Company for the purpose set forth and directs that it shall be paid to him "absolutely" upon the happening of a specified condition, he to receive periodically the income derived from its investment.

It must, however, not be overlooked that there is no bequest over,—no restriction of the legacy to the life of Milton,—no limitation as to time, but a gift of the income in perpetuity,—a plain intent to give the entire beneficial interest in the legacy to Milton, merely postponing his enjoyment of the principal,—an evident hope and expectation that he would be able to accumulate property within the designated period, (there being no provision for any other contingency,)—and the fact that to hold the gift to Milton to be contingent and not vested so far as the principal is concerned, would necessarily treat the testator as having died intestate as to part of his estate in spite of his manifest purpose: see *Boies' Est.*, 177 Pa. 190, 196, to dispose of the whole of it. All of this makes against the conclusion that there is in what follows the direct bequest to Milton a clear intent to give him a less than absolute interest in the principal and seems to require a contrary understanding. Nor is the creation of a trust inconsistent with the bequest of an absolute beneficial estate: *Krebs's Est.*, 184 Pa. 222, 223-4. Indeed, the present case appears to be ruled by *Millard's App.*, 87 Pa. 457, which is substantially as nearly as can be on all fours with it. The provision of the will there in question was this:

"I give . . . to my executrix . . . the sum of \$30,000 in trust that she place the same out at interest . . . and pay over the interest . . . unto my nephew, Joseph M. Millard; and in case the said Joseph M. Millard shall be sober and industrious in his habits my said executrix may, and she is hereby authorized to pay over to him . . . such portions of the principal as she in her judgment shall deem right and proper, or she may at any time . . . pay over to him the whole of said \$30,000."

It was held that this was a vested legacy in the nephew passing to his administrator upon his death, the principles invoked being that a gift of the income of a fund without limitation as to time is a gift in perpetuity and carries the fund itself; that where there is no bequest over and no restriction to the life of the first taker the gift is absolute; and that where it is plain that the intention of the testator was to give the entire beneficial interest of a bequest, the fact that he withheld the enjoyment of the principal as above indicated in no wise affects the question of intention. All this seems to apply directly and almost literally to the present case, which is perhaps stronger in the line of plaintiff's contention than the *Millard* case, because of the gift to Milton preceding the provision postponing his enjoyment of the principal. If, in the *Millard* case, the interest of the legatee was vested, it of course was liable for his debts, and so it must be held here that the principal of Milton's share is liable for his

obligations. Accordingly we feel constrained to decide the question here arising in favor of the plaintiff and against the garnishee.

The rule to show cause is made absolute.

BUCK et al. vs. ZIEMER.

Practice C. P.—Province of the Court and Jury—Verdict Based on Guess or Compromise—New Trial.

1. The Court is always careful to avoid interference with the province of the only tribunal our legal system has provided for the trial of disputed facts, when their action can be attributed to the influence of legal testimony, even by a strained intendment, but where no intendment can sustain a verdict rendered, it must be set aside.

2. Where in the light of the evidence the jury's verdict appears to be a guess or a compromise, it will be set aside and a new trial granted.

In the Court of Common Pleas of Berks County.

No. 8 September Term, 1917.

Trial and verdict for Plaintiffs.

Rule for new trial.

H. F. Heinly for Defendant and Rule.

Lee Friday contra.

Opinion by Endlich, P. J., October 26, 1918—In *Hawman vs. Turnp. Road Co.*, 2 Woodw. 332, at p. 336, Judge Woodward, then presiding over this Court, enunciated the principle, which is really axiomatic, that the Court is always careful to avoid interference with the province of the only tribunal our legal system has provided for the trial of disputed facts, when their action can be attributed to the influence of legal testimony, even by a strained intendment, but that where no intendment can sustain a verdict rendered it must be set aside. The present case, upon a careful review of the record, seems to belong to the latter class.

The defendant leased a portion of his farm to the plaintiffs on shares. Before the expiration of the term fixed by the lease he required them to give up possession to him because, as he conceived and alleges, they were not cultivating or attending to it properly as contemplated by the lease. The plaintiffs in obedience to his demand surrendered the property and brought this action against him to recover damages for breach of contract, the measure of damages being agreed on all hands to be the difference between the

value of the plaintiffs' share of the produce to be realized or expected and the cost of materials and labor already put into and still to be put into its cultivation. The testimony adduced by plaintiffs at the trial but vaguely indicates the possible total quantity and value of the crops. The plaintiffs' counsel, by his interpretation of that testimony, has, as representing the quantity and value in question, reached the figure of \$1,700, the half of which would be plaintiffs' share, to wit, \$850. They offered, however, no proof of the cost of production. Neither was there evidence of any shortcoming by defendant with respect to the cultivation of the land after it came back to him; and on his part there was evidence of the cost of producing the crops, which is really all the evidence on that subject that we have in this case. Of course the plaintiffs are entitled to the benefit of it: *Ins. Co. vs. Gackenbach*, 115 Pa. 492, 499. By it it appears that together with the plaintiffs' share of seed, which defendant furnished or paid for, the cost of production was \$268.78. Deducting this from \$850 would leave a balance in favor of the plaintiffs of \$581.22. This balance is further to be reduced by \$183.88, the amount of a setoff claimed in defendant's affidavit of defence, not denied by any reply of the plaintiffs, and therefore, as is conceded by plaintiffs' counsel, to be taken as admitted and as bound to be allowed by the jury in this case. The deduction of that set-off would result in a balance in favor of plaintiffs of \$397.34. There is, however, on the part of the defendant, positive testimony as to the actual and exact quantum of the crops produced, the value of which, at the figures given in the plaintiffs' evidence, foots up \$785.76, the half thereof being \$392.88. The deduction from this sum of the cost of production, already stated as \$268.78, would leave a balance in favor of the plaintiffs of \$124.10, which, by the set-off of \$183.88, would be converted into a balance due the defendant of \$59.78. The verdict of the jury was for the plaintiffs for the sum of \$248.09, an amount which agrees with neither the plaintiffs' evidence nor that of defendant, and which cannot be reached by any interpretation of the one or the other that has been pointed out to the Court or has suggested itself to the same as reasonable. It thus seems impossible to harmonize the finding of the jury with any aspect of the evidence,—or, in other words, to look upon it as founded upon aught but a guess, which cannot be permitted to control: see *Ry. Co. vs. Taylor*, 104 Pa. 306, 316-7, or a compromise, which is not to be countenanced: see *Sloan vs. Johnson*, 20 Pa. Super. 643, 650. For these reasons, in accordance with the principle above declared,—

The rule to show cause is made absolute.

READING vs. SHENK.

~~Municipalities—Cities of the Third Class—Liens—Sewers—Sewers~~
Laid on Private Property—Act 30, March, 1903, P. L. 115, sec. 5.

Under sec. 5 of the Act 30, March, 1903, P. L. 115, a city of the third class has the right to construct a sewer along an alley which was never by the city legally laid out, taken over or opened as a public thoroughfare and charge the cost on the abutting property.

In the Court of Common Pleas of Berks County.

No. 226 February Term, 1913.

Sci. fa. on municipal lien.

Trial and verdict for Plaintiff.

Rule for judgment non obstante veredicto.

Caleb J. Bieber and Earle I. Koch for Defendant and Rule.

Wellington M. Bertolet, city solicitor, and Fred A. Marx, assistant city solicitor, contra.

Opinion by Endlich, P. J., October 26, 1918.—There are no disputed facts in this case. The defendant is the owner of a property fronting on Moss street, and in the rear, at a distance of 100 feet from Moss street, abutting on a street or alley known as Clover street or alley, which was never by the city legally laid out, taken over or opened as a public thoroughfare, but has been actually in use at least as a private street or alley. The city laid a branch sewer along this Clover street or alley against the objection of the defendant and has assessed the cost thereof upon his property abutting thereon. A lien was subsequently filed by the city against the defendant's property to No. 2181 Jan. T. 1908, C. L. D., and this sci. fa. was issued upon the same for its collection. The defence is that the city had no legal right to construct the sewer along Clover street or alley and charge the cost upon the defendant's property. That the ground covered by such a street is private property is decided in Harrisburg vs. Brightbill, 6 Distr. R. 438, and is not questioned. That, under the Act 23, May, 1889, P. L. 277, the city had no right to lay a sewer along such a street or alley and charge the cost or any part of it upon the abutting properties is also involved in the case just cited. That, indeed, no such right existed prior to the Act 30, March, 1903, P. L. 115, seems to be conceded. But the Act of 1903, in sec. 5, provides that—

"The councils of any city . . . shall have power, without petition therefor, to construct . . . sewers of all kinds in its public streets, lanes, alleys, highways, and over and across public and private lands or property, and to pay the cost and expense thereof out of the general revenues, or special

funds raised for said purpose, or to assess the same upon abutting property”

The language of this provision as applicable to the present case is very plain and leaves no room for doubting its effect and meaning. *Absoluta sententia expositore non eget*. Accordingly at the close of the trial of this case the Court instructed the jury to render a verdict in favor of the city, and we are constrained to hold that this instruction was not only warranted but required by the Act of 1903 as above quoted. The suggestion that the sewer laid on Clover street is not needed by the defendant inasmuch as there is a sewer along the front of his property, is not found in the affidavit of defence, and hence, under our Rules of Court, is not available as a defence, even if otherwise it might be. It therefore calls for no discussion.

The rule to show cause is discharged.

HODGES vs. FOSS-HUGHES CO.

Contracts—Sale and Purchase—Waiver of Stipulation—Question for Jury.

The requirement in the draft of a contract of sale and purchase that the contract must be signed by an officer or branch manager of the vendor company before becoming a contract binding on the company, being inserted for the protection or benefit of the vendor, may be waived, and the question of waiver is ordinarily one for the jury, being for the Court only where the facts are indisputable and the inference from them one of law.

In the Court of Common Pleas of Berks County.

No. 79 November Term, 1916.

Trial and verdict for Plaintiff.

Rule for new trial and for judgment non obstante verdicto.

Paul Freeman and W. K. Stevens for Defendant and Rules.

John B. Stevens contra.

Opinion by Endlich, P. J., October 26, 1918.—The plaintiff claims that on July 14, 1916, he entered into a contract with the defendant whereby the latter sold to him and he purchased a second-hand automobile which the defendant expected to get in and was to deliver to plaintiff by Aug. 1, 1916. The plaintiff was to pay the defendant \$1,175, of which \$175 were paid to or “deposited” with the defendant at the making of the alleged contract. An inspection of the paper declared

upon and produced as the contract of sale and purchase shows that its own terms required it to be signed by an officer or branch manager of the defendant company before becoming a contract binding on the same, and that this paper was not so signed, though it was signed by a salesman with the permission and in the presence of the branch manager. When Aug. 1 came around the defendant was unable to deliver the car to the plaintiff because it had not come into the defendant's hands, the owner having changed his mind about surrendering the car in part payment of another which he was acquiring. The defendant thereupon notified the plaintiff of its inability to furnish the car, and offered to return the \$175. The plaintiff, not satisfied with that, brought this action against the defendant alleging the breach of its contract and claiming damages therefor. At the trial the defendant objected to the admission in evidence of the alleged contract because not signed by an officer or branch manager of the company. It was considered by the Court that the requirement of such signature might be waived by defendant. The paper was admitted, the question of waiver of the signature or no waiver thereof, and consequently of the status and effect of the paper as a contract or not, being regarded as one for the jury to pass upon, and accordingly submitted to it. The jury found for the plaintiff, and defendant obtained these rules for judgment n. o. v. and for a new trial. At the argument, the matter alone pressed upon the Court was that just spoken of, relating to the alleged contract, and that is the only one now calling for discussion.

That the presence of such a requirement as above stated in the draft of a contract and the absence of compliance with it may have the effect of leaving the paper without any efficacy as a contract until the lacking signature is supplied, seems clear enough upon reason as well as upon authority: see *Car Adv. Co. vs. Distilling Co.*, 49 Pa. Super. Ct. 442. But, like many other provisions inserted for the protection or benefit of one of the parties to a bargain, it may be waived. *Cuilibet licet renunciare juri pro se introducto*. And the question of waiver is ordinarily one for the jury: *Eckert vs. R. R. Co.*, 211 Pa. 267, 277; *Pittsburg C. Co. vs. R. R. Co.*, 227 id. 90, 99, being for the Court only where the facts are undisputed and the inference from them one of law: *ibid*. The fact that the company accepted the payment or "deposit" of \$175 and retained it until after Aug. 1 is not open to serious question. And the testimony of the defendant's branch manager, between whom and the plaintiff the transaction took place, indicates very strongly that whilst the word "contract" is avoided, the paper was looked upon as an "order," and as such complete enough to be accepted by the defendant, though signed only

by one of its salesmen as above stated. Is the proper inference to be drawn that defendant waived further and strict compliance with the mode of execution it had itself prescribed for its own protection or benefit?—or is it not? Obviously that was for the jury to decide; and their decision depending upon presumptions of fact, there is no rule of law whereby its correctness can be determined by the Court: see *Trust Co. vs. R. R. Co.*, 160 Pa. 590, 600. Tested by the principle that a verdict is to be understood and the facts found by it ascertained by reference to the charge of the Court: see *Mintzer vs. Hogg*, 192 Pa. 137, 144; *Smith vs. Shields*, 194 id. 635; *Kaechele vs. Traction Co.*, 15 Pa. Super. Ct. 73, 76, it is very clear that the jury in this case have affirmed the waiver by defendant of the requirement in question. The result is that we have here a case of a contract of sale and a failure on the part of the defendant to live up to it, entitling the plaintiff to damages; and there seems to be no room either for a judgment non obstante veredicto or for the granting of a new trial.

The rules to show cause are discharged.

GOTTSCHALL vs. WELLER.

Negligence—Contributory Negligence—Automobile Truck—Question for the Jury.

1. On the trial of an action for damages for personal injuries resulting from the alleged negligence of the defendant's employee in driving an automobile truck, a verdict for the plaintiff will be sustained where the plaintiff adduced evidence that the truck was driven around a corner down a crowded street without sounding the horn, that the driver paid no attention to signals and shouts to stop, and that instead of looking ahead he kept looking backwards and thus ran into the plaintiff, and the defendant's witnesses testified that the plaintiff stepped backwards right in the way of the truck without looking in the direction in which he was stopping.

2. The existence of contributory negligence on the part of a plaintiff can be declared by the Court as a matter of law only in clear cases. Where the testimony is conflicting or susceptible of different inferences, it is for the jury.

In the Court of Common Pleas of Berks County.

No. 52 August Term, 1917.

Trespass. Trial and verdict for Plaintiff.

Rule for new trial and for judgment non obstante veredicto.

Wilson S. Rothermel for Defendant and Rules.

H. K. Dumn contra.

Opinion by Endlich, P. J., October 26, 1918.—Early in the afternoon of May 26, 1917, the plaintiff and a number of other persons were waiting in South Second street to form in order for a flag-raising parade which was about to take place. There were, according to different estimates, 50, 100 or 200 persons gathered together approximately 50 or 100 feet south of the intersection of Penn and Second streets on the western and shady foot-pavement and extending 12 or 15 feet into the street. Defendant's two-ton automobile truck, coming along at a speed variously stated as 4, 10 and 12 miles an hour, turned from Penn street into South Second street on its western side, where under ordinary circumstances it belonged, but where on this occasion the crowd was collected, whilst the remaining portion of the street to the east was practically clear to a width of about 20 feet. The grade of Second street south of Penn is slightly downwards in the direction in which the truck was going. There was evidence that its driver did not sound his horn,—this being contradicted, however, by testimony on the defendant's side. Further there was evidence, also contradicted, that the driver paid no attention to signals given to him and shouts addressed to him to stop, and that instead of looking ahead he kept looking backwards. The crowd in front of him opened or scattered to let the truck pass through. The plaintiff, however, who was in the midst of it in the street, with his back turned to the approaching truck, was struck by its right front wheel at the heel of his left foot, thrown down and painfully injured. It was testified on the side of the plaintiff that at the time of the collision he was standing still, but on the defendant's side that he stepped backwards right in the way of the truck without looking in the direction in which he was stepping. The jury was told in the charge that if the defendant's contention in this particular was true, the plaintiff was guilty of contributory negligence and not entitled to recover, but that if it was not true, the question of defendant's negligence would have to be passed upon by the jury. The verdict was for the plaintiff, and the defendants obtained these rules for a new trial and judgment *n. o. v.*

It is well settled that the existence of contributory negligence on the part of a plaintiff can be declared by the Court as a matter of law only in clear cases; *Mortimer vs. Traction Co.*, 216 Pa. 326; *Joyce vs. R. R. Co.*, 230 id. 1; *Thorne vs. Transit Co.*, 237 id. 20; *Cramer vs. Aluminum Co.*, 239 id. 120; *Schmidt vs. Ry. Co.*, 244 id. 205, (and see *Di Grazio vs. R. R. Co.*, 261 id. 364; *Maynard vs. Barrett*, *ibid.* 378), and that otherwise, where the testimony is conflicting or susceptible of different inferences, it is for the jury. So here, if the plaintiff's story was substantially correct, the driver of defendant's truck was

bound to see the plaintiff and if practicable avoid striking him,—a thing which would appear to have been feasible upon defendant's own statement that the speed of the truck was about four miles per hour. Moreover, it must not be overlooked that the eastern half or more of the street afforded a virtually clear passage: see *Smoker vs. Locomotive Wks*, 261 Pa. 341. On the other hand, if the defendant's version is believed, the plaintiff acted carelessly and brought his injury upon himself. The question of defendant's negligence was thus in the case and was for the jury, and so was the question of plaintiff's contributory negligence. The case was submitted to the jury upon the lines indicated, and no exception was taken by the defendants to the charge, but only to the refusal of a point asking for binding instructions. Nor has any satisfactory reason been brought to the notice of the Court either for the granting of a new trial or for the entry of judgment non obstante veredicto, and therefore,—

The rules to show cause are discharged.

STRASSER vs. SEAMAN.

Practice, C. P.—Trespass—Appeal for Alderman's Judgment—Affidavit of Defense Raising Question of Law.

In an action of trespass brought into the Common Pleas on appeal from the judgment of an alderman, judgment will be entered for the defendant on an affidavit of defence raising a question of law where the transcript clearly shows that the action was based on the defendant's negligent driving of an automobile.

In the Court of Common Pleas of Berks County.

No. 34 March Term, 1918.

Trespass. Affidavit of defense raising questions of law.

H. J. Dumn, for defendant.

H. F. Heinly, for plaintiff.

Opinion by Wagner, J., October 26, 1918.—This is an action of trespass brought into court upon appeal from the judgment of an alderman. The defendant in his affidavit of defense raises this question of law: Want of jurisdiction in the alderman for the reason that the suit is for consequential damages arising from defendant's negligence. The alderman's transcript states that: "Plaintiff claims the recovery of damages...*...*...for injury done and committed to an

automobile the property of the plaintiff by the defendant negligently driving by force an automobile operated by him into and against the said automobile of the plaintiff." Plaintiff contends that because the words "by force" are used that the alderman had jurisdiction, and cites as authorities: Strohl vs. Levan, 39 Pa. 177, and Gingrich vs. Sheaffer, 16 Pa. Superior Ct. 299.

It is clear from the transcript that the negligent driving of the defendant is made the basis for the recovery of damages. The additional words "by force" as used, if they mean anything, mean merely that by the negligent driving the automobile with force was projected against the automobile of the plaintiff, thereby causing the damage claimed.

Gingrich vs. Sheaffer, *supra*, has no application to this case. Whilst the injuries in that case resulted from negligence, it was not the negligence that was sued upon and for which the plaintiff recovered, but for \$40, being the amount expended by plaintiff at the special instance and request of the defendant. That is, it was a suit in *assumpsit* upon a contract. The court there specifically says, on page 305: "The first was based on express contract and was clearly within the jurisdiction of a justice of the peace." The court held that the second part of plaintiff's claim of \$21 for damages alleged to have been sustained by reason of defendant's negligence, could not be recovered.

Strohl vs. Levan, *supra*, was not a case of negligence, but one of wilful wrong, as is clearly shown by the facts of the case, and by the charge of the court below, where (p. 178) the court says: "It was the duty of the defendant not only to allow him to pass, but to have facilitated his movements in that way. It was clearly his duty to have yielded part of the road if he could. If not, he should have stopped his team and have allowed the plaintiff to pass. He was not asked to do either. The plaintiff was willing to make his way round the wagon or team. If you believe the evidence, the defendant was not willing that he should do so, but, sitting on his wagon with a load upon it, and four mules attached to it, allowed his son to start the team at a rapid rate to prevent his passage. Failing in that, the whip was applied, and the team pursued the light carriage, doubtless with a view of punishing plaintiff for having accomplished a passage round them. If such was the case the act was wrong, and the party deserves to be punished."

Neither of these cases supports plaintiff's contention, but are authorities for defendant's contention. See also Thilow

vs. Philadelphia Traction Co., 4 Dist. Rep. 83; Lynch et al. vs. Alderfer, 6 Montg. Co. Law Rep. 108.

Judgment is directed to be entered in favor of the defendant.

BORKEY vs. FAUST.

Practice, C. P.—Verdict—Form of Verdict.

Where the verdict actually rendered by the jury accords with the form prepared by it in the jury room it will be sustained.

In the Court of Common Pleas of Berks County.

No. 33 January Term, 1917.

Trespass. Trial and verdict for plaintiff.

Rule to show cause why the verdict entered should not be stricken from the record.

Caleb J. Bieber, for defendant and rule.

C. H. Ruhl, contra.

Opinion by Wagner, J., October 26, 1918.—This is an action in trespass by plaintiff against defendant for damages which plaintiff contended he sustained because defendant entered upon plaintiff's premises and cut down and removed from his land four trees and removed a fence at the dividing line and committed other unlawful acts upon the premises. The evidence showed that the fence separating the lands of the two parties was what is known as a worm fence. It was agreed by the parties that the zigzag location of this fence did not constitute the boundary line, but that the boundary was represented by a straight line. Under the evidence, the jury could have rendered one of these verdicts: First, in favor of the defendant; second, in favor of the plaintiff for nominal damages; and, third, in favor of plaintiff for substantial damages. It was admitted by defendant that he had taken into possession and farmed the entire tract of land covered by the worm fence. Under this admission the jury could have rendered a verdict for the defendant only upon the ground that the straight boundary line was on the outer edge of or beyond the ground occupied by this zigzag fence on the side towards plaintiff's premises.

The verdict returned and recorded was "for plaintiff for six cents damages and costs." That is, a verdict for nominal damages. The verdict slip contains this: "That the jurors find

that the dividing line between the Faust and Borkey farms should be the centre line of the old worm fence. We find not to allow the plaintiff any damages." Upon the return of the jury to the court room the court explained to it that a verdict in that form could not be taken, and asked, in view of the form prepared in the jury room, and the evidence and admission in the case, whether by it they intended a verdict for plaintiff for nominal damages. Upon receiving an affirmative answer, the verdict as recorded was then rendered by the jury.

Defendant contends that error was thus committed in that it is plainly evident from what was contained on the verdict slip that what it intended to return was a finding in favor of the defendant. He therefore asks us at this time to so change the verdict. When the jury found, as is evidenced by the verdict slip, that the boundary line between the two farms was the centre line of the old worm fence, it then conclusively followed, from defendant's aforesaid admission, that defendant had taken possession of said part of plaintiff's land. This made it impossible for them to find a verdict for defendant.

The next matter for it to determine was whether to find a verdict for plaintiff for nominal or substantial damages. The only evidence as to the amount of plaintiff's damages related to the value of the trees alleged by plaintiff to have been on his land, and to have been unlawfully cut down and removed by defendant. Whether substantial damages were to be awarded depended upon its finding whether these trees were on plaintiff's or on defendant's land. "We find not to allow the plaintiff any damages," in the verdict slip, was evidence of a finding that these trees, for which substantial damages were claimed, were on defendant's land. It is therefore clear, when we compare this verdict which as actually rendered by the jury, and which must be considered its verdict: *Com. vs. Dudley*, 46 Pa. Superior Ct. 337, 347, with the form prepared in the jury room, that the verdict rendered entirely accords with the jury's conclusion in the jury room. In view of the plain agreement of the verdict rendered with the form prepared by the jury in the jury room, it is not necessary to consider the question whether the court has the power to at this time change the verdict, as requested by defendant. The defendant based his whole argument upon the rule to show cause why the verdict entered in favor of the plaintiff should not be stricken from the record and one entered in favor of the defendant, and asked that the rule for a new trial be discharged.

Both rules are discharged.

SECOND NATIONAL BANK OF READING vs. ZABLE.

Bills and Notes—Checks—Post-dated Check—Payment by Mistake—Stopping Payment—Affidavit of Defence.

On March 14, 1918, the defendant presented to plaintiff bank a check drawn by A. dated a week later, and the teller, not observing that the check was post-dated, inadvertently paid the amount thereof to the defendant, on March 16, 1918. A. stopped payment on the check. Two days later the plaintiff notified the defendant of the mistake in payment, that payment of the check had been stopped, and demanded a return of the amount mistakenly paid. Upon defendant's refusal to pay, plaintiff protested the check and sued the defendant, who filed an affidavit of defence admitting the cashing of the post-dated check but averring a want of knowledge that the plaintiff's teller inadvertently paid the check by mistake. Rule for judgment for want of a sufficient affidavit of defence made absolute.

The drawer of a check has the right to stop payment any time prior to its date and actual payment.

In the Court of Common Pleas of Berks County.

No. 95 May Term, 1918.

Assumpsit.

Rule for judgment for want of a sufficient affidavit of defence.

Isaac Hiester, for plaintiff and rule.

Charles H. Tyson, for defendant.

Opinion by Wagner, J., October 26, 1918.—Plaintiff brought suit against the defendant on a check of which H. W. Ailes was the drawer to the order of the defendant, Joseph Zable, on the plaintiff, the Second National Bank of Reading, for \$35. The check was dated March 21, 1918. Plaintiff's declaration avers that on March 14 the defendant presented to plaintiff this check endorsed by him, and demanded payment thereon. That plaintiff's teller, not observing that the check was post-dated, inadvertently paid the amount thereof to the defendant, believing that it was then due, and that the payment of said check had been made through teller's mistake. That on March 16, Ailes stopped payment on the check. That on March 18 plaintiff notified the defendant of the mistake in payment, that payment of the check was stopped, and thereupon demanded from defendant the amount paid on the check by plaintiff. Upon payment being refused, plaintiff, on March 21, protested the check.

The defendant admits that the check was dated March 21, 1918, and that it was cashed on March 14, 1918, but avers to plaintiff's statement that its teller did not observe that the check was post-dated and inadvertently paid the same through mistake, its want of knowledge of these facts, and asks that plaintiff be put to proof thereof.

It is clear that this being a post-dated check, was upon the face of it, payable not on March 14, but upon its date March

21. The post-dated check was an "engagement on the part of the drawer that he either had or would have funds in the hands of the payer, at the day of its date:" Hill vs. Gaw, 4 Pa. 493, 496. In Champion vs. Gordon, 70 Pa. 474, 476, we have: "What the drawer undertakes is, that on a day named he will have the amount of the check to his credit in the bank. In the mean time he wants the full and free use of his entire deposit. It is not denied that a post-dated check cannot be presented for acceptance. That is by implication payable on a future day."

In the affidavit of defence there is no averment that this check was paid in any manner other than is usual for checks to be paid. The check was drawn against a deposit and was a mere order by the drawer to the bank, on the date of the check, out of said deposit, to pay the amount of the check: Werley vs. Dunn, 56 Pa. Superior Ct. 254, 258. Payment of this check having, therefore, been made prior to its date, upon the face of it, a mistake was made. The drawer had the right to stop payment of the check at any time prior to its date and actual payment. After notice of non-payment the bank could pay out only at its peril: Saylor vs. Bushong, 100 Pa. 23, 27. In German N. Bank vs. Farmers' D. N. Bank, 118 Pa. 294, at page 313, we have: "I presume no one at this day questions the right of the drawer of a check to stop the payment thereof. This is usually done by notice to the bank upon which the check is drawn. If the bank pay after such notice it does so at its peril." The affidavit of defence does not specifically deny that the drawer stopped payment prior to its date.

We have then, in this case, as disclosed by the pleadings, a clear mistake in the payment of the check. Money so paid may be recovered: Meredith vs. Haines et al., 14 W. N. C. 364, 366. "The fact that the person making the payment has the means of knowledge at hand and overlooks the same by an inadvertence, is immaterial if the party receiving the same is not entitled to it:" Girard Trust Company vs. Harrington, 23 Pa. Superior Ct. 615.

Rule for judgment for want of a sufficient affidavit of defence made absolute.

FEGLEY vs. ROTHERMEL.

Contracts—Heating Plant—Evidence—Weight of Evidence—New Trial.

In an action of assumpsit for labor and material furnished in installing a heating plant in the house of the defendant, a verdict for the plaintiff will be set aside as against the weight of the evidence, where a fair consideration of the evidence impels the conclusion that the plant was of no use and unsatisfactory to the defendant and that the plaintiff had agreed that he would remove the system if it proved unsatisfactory to the defendant.

In the Court of Common Pleas of Berks County.

No. 23 March Term, 1918.

Assumpsit. Trial and verdict for plaintiff.

Rule for new trial.

J. H. Rothermel, for defendant and rule.

F. A. Marx, for plaintiff.

Opinion by Wagner, J., October 26, 1918.—Plaintiff's action against the defendant is for \$597.66, with interest, for labor and material furnished in installing a heating plant in the hotel and dwelling house of the defendant. The jury found a verdict for plaintiff for the amount claimed. The defense was that at the time the parties entered into the contract for the installation of the heating system, plaintiff agreed with the defendant that the system was to be satisfactory to him (defendant), and, if not, he (plaintiff) would remove it. The defendant asks for a new trial on the ground that the verdict was against the weight of the evidence.

It is plain from the evidence that the system as installed by the plaintiff was not even usable, and, therefore, could not have been satisfactory to the defendant. Defendant contended that the fault of the system lay in not using large enough main and branch pipes, and in faulty construction, which caused many leaks. The system was installed the latter part of November or the beginning of December, 1917, and was used until February 25, 1918, when, on account of the failure of the system to heat the building, defendant was obliged to discontinue its use.

Defendant's witness Lawrence J. Linderman, a traveling salesman, testified that he got to this hotel twice a week from December until February 25. That in one of the pipes there was a split of six inches; that in the front main line there were 19 leaks and in the back main line 18 or 19. That in the dining room they had to have kettles hanging at the pipes to catch the water at the joints. That he saw these conditions every time that he was there.

The testimony of John S. Rothermel, defendant, Charles K. Fisher, who is in the plumbing and heating business, A. W. Luck, a heating engineer, and Mrs. Rothermel, wife of the defendant, corroborates that of Linderman as to the leaks. That there were some leaks was admitted by plaintiff. When he was asked, "They had to hang kettles up?" he evaded the question, and answered, "They were small leaks, they were supposed to take up (N. of T., p. 9)."

William B. Roberts, plaintiff's witness, who was employed by plaintiff to put in this system, testified that there were

leaks, but as an excuse therefor said that, "As far as my experience goes you get them on almost every job, but they pack themselves (p. 14)."

A fair consideration of the entire evidence impels the conclusion that the pipes of this heating system were not properly fitted or joined together. The principal complaint was that the system failed to properly heat the building. Plaintiff's explanation of this was that certain radiators that the defendant had on hand and which he claimed defendant had requested him to use, were insufficient in radiation. It was, however, established beyond question, as is testified by plaintiff (p. 11), that the radiators in the bar room, the bath room, and the sleeping room above the bar room were large enough to properly heat these rooms. Mr. Luck testified that the bath room radiator had an excess radiation of 20 feet, and yet it was two of these, the bar room and the bath room, that the defendant had the most trouble to heat. The testimony most conclusively shows that the system did not in any way comfortably heat these two rooms. They were seldom able to get a temperature in the bar room beyond 56 degrees, and the bath room was so cold that water froze therein. These circumstances would strongly indicate that the trouble lay, not in the radiation, but in some other part of the system.

A. W. Luck, a heating engineer of 30 years' experience, clearly and convincingly explains the trouble. In his testimony, also supported by other witnesses, he says that the main and branch pipes were too small. That at each of the numerous leaks a vacuum was formed in the pipes, which prevented a proper circulation of the water. This explains why, as Mr. Rothermel testified, it took them every morning about an hour to fill the radiators with water, and to draw out the air.

The only time that plaintiff tried to test this system was one afternoon in December. Defendant testified, and he is not contradicted, that upon six or seven different occasions he made complaints to the plaintiff about the system not working; that he received no relief, and the only answer he received to his last complaint was that he (defendant) should take it up with his (defendant's) lawyer. The strongest evidence that this heating system did not do its work was the fact that defendant was obliged to discontinue the use thereof on February 25, at a time when heat was most needed. The evidence uncontrovertibly proves that this system, as installed, must necessarily have been not only unsatisfactory to the defendant, but not even of use to him.

The question then is: Was the contract between the plaintiff and defendant as contended by defendant, that this system had to be satisfactory to defendant when installed? The de-

fest weight of the evidence, it cannot be said that a dispute, within the meaning of the Act, has arisen. On the other fendant, his wife, son, and Edward F. Swavely testified that this was the agreement. This is denied by the plaintiff. We have then four witnesses testifying to the agreement that it had to be satisfactory, as against the plaintiff's testimony that such was not the agreement. Were this the only circumstance in the case we realize that the mere weight in the number of witnesses that the defendant produced, especially when their relationship to him is considered, would not be sufficient to warrant the granting of a new trial upon the ground that the verdict was against the weight of the evidence. When Mr. Fegley was asked by his counsel what the contract was, he said, "We had no contract whatever. The only contract we had is that I gave him a price on the boiler and a price on two radiators (pp 3, 4)," and that the only thing that he (defendant) asked was what I was getting an hour for help, and I informed him 50 cents an hour. It is hardly probable that the owner of a hotel property would enter into a contract to install a steam heating plant on a loose arrangement of this kind. When plaintiff was further interrogated by his counsel, he answered that he was told to install this heating system and use the radiators that were there. That only the sufficiency of the boiler was spoken about. That defendant wanted him to guarantee that the system "would heat the bath room," but that he would not make any guarantee.

It would seem strange that the defendant would insist upon a guarantee with reference to the bath room and not to other portions of the house. From the testimony of Mr. Rhodes, one of plaintiff's witnesses, we have that when the system did not work the question at once raised by the defendant was that it did not come up to the contract in that it was not satisfactory. We consider that a new trial should be granted upon defendant's reason that the verdict is against the weight of the evidence.

Rule for new trial made absolute.

BURBECK'S ESTATE.

Decedents' Estates—Wills—Issue to Common Pleas.

1. The Orphans' Court will not direct an issue to the Common Pleas to try the validity of a will where the testimony is such that, after a fair and impartial trial resulting in a verdict against the proponents of the alleged will, the trial judge, after a careful review of all the testimony, would feel constrained to set aside the verdict as contrary to the manifest weight of the evidence. On the other hand, if the state of the evidence is such that the judge would not feel constrained to set aside the verdict, the dispute should be considered substantial, and an issue to determine it should be directed.

Same—What Constitutes Testamentary Capacity.

2. A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in; the full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the recipients of his bounty.

Same—Wills—Unnatural Will.

3. A will is unnatural in a legal sense only when it is contrary to what the testator from his known views, feelings and intentions would have been expected to make. When it is in accordance with such views it is never unnatural, however much it may differ from the ordinary actions of men in similar circumstances.

In the Orphans' Court of Berks County.

In the matter of the Appeal of Charles Weber, guardian of Meta Burbeck, surviving grandchild, from the decision of the Register of Wills, admitting to probate a certain paper purporting to be the last will and testament of the decedent.

C. H. Ruhl, W. H. Sharman, Joseph R. Dickinson, and Edwin L. DeLong for the appellant.

Jefferson Snyder and J. Wilmer Fisher for the proponents.

Opinion by Schaeffer, P. J., April 28, 1917—On March 16, 1914, George H. W. Burbeck, executed a paper purporting to be his last will and testament, wherein he bequeathed \$100 to Charles Evans Cemetery Company, \$1,000 to Arthur Green, \$50 to his only granddaughter, and the residue to George W. Green and Annie, his wife, share and share alike. Mr. Burbeck died on April 11, 1915, and on April 16, 1915, his will was duly admitted to probate. On March 25, 1916, an appeal from the Register's decision admitting the alleged will to probate was taken by Charles Weber, guardian of Meta Burbeck, the granddaughter of the decedent. This Court is now requested to direct an issue to the Court of Common Pleas, to try the genuineness of the paper in question. The appellant denies the validity of this will, for the reason that, at the time of making it, George W. H. Burbeck was not of sound and disposing mind, memory, and understanding; and, further, that the will was procured by undue influence. The question for our consideration is, whether upon the testimony presented by the respective parties such a "substantial dispute" as to the testamentary capacity of the testator and the exertion of undue influence has arisen, as to warrant a submission of it to a jury.

The rule in such cases is well settled: "If the testimony is such that, after a fair and impartial trial, resulting in a verdict against the proponents of the alleged will, the trial judge, after a careful review of all the testimony, would feel constrained to set aside the verdict, as contrary to the mani-

hand, if the state of the evidence is such that the judge would not feel constrained to set aside the verdict, the dispute should be considered substantial, and an issue to determine it should be directed." *Knauss's Appeal*, 114 Pa. 20; *Donneley's Estate*, 227 Pa. 609; *Schweitzer's Estate*, 228 Pa. 231; *Phillips' Estate*, 244 Pa. 35.

The authoritative test, therefore, is whether upon all the testimony, a verdict against the proponents of the will should be allowed to stand; and if such a verdict ought not to be allowed to stand, an issue ought not to be awarded: *Donneley's Estate*, *supra*.

In determining the question, whether we should sustain a verdict against the will under the testimony, we must keep in mind the meaning of testamentary capacity. What constitutes testamentary capacity has been laid down so often and in so many cases, that it is virtually needless to cite authorities. "A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in; the full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the person and objects he desires shall be the recipients of his bounty." *Wilson vs. Mitchell*, 101 Pa. 502; *Smith's Estate*, 250 Pa. 87. If, from any cause, an alleged testator is so enfeebled in mind as to be incapable of knowing the property he possesses, of appreciating the effect of any disposition made by him of it, and of the distinctly understanding to whom he intends to bequeath it, he is without the testamentary capacity required to make a will: *Leech vs. Leech*, 21 Pa. 69. But "if he understands, in detail, all he is about, and chooses, with understanding and reason, between one disposition and another, it is sufficient." *Daniel vs. Daniel*, 39 Pa. 208.

We must remember that neither age nor sickness, nor extreme distress, nor debility of body, will affect the capacity to make a will, if sufficient intelligence remains. The failure of memory is not sufficient to create the incapacity, unless it be total, or extends to the immediate family and property: *Wilson vs. Mitchell*, *supra*.

"Testamentary capacity is the normal condition of one of full age, and the affirmative is with him who undertakes to call it in question, and this affirmative he must establish, not in a doubtful, but in a positive manner." *Grubbs vs. McDonald*, 91 Pa. 236. It is, therefore, proper to start with the presumption that testator was of sound and disposing mind, sanity being the normal mental condition, and such *prima facie* "can only be overcome by clear, definite, circumstantial and weighty evidence of facts not reconcilable with the possession of testamentary capacity." *Morgan's Estate*, 219 Pa. 355.

With these legal principles in mind, we must determine whether the testimony presented by the respective parties raises such a substantial dispute, as to the testamentary capacity of the testator, as requires us to submit it to a jury, for solution.

George H. W. Burbeck, was about seventy-four years of age at the time of his death, and a widower leaving a grandchild, Meta Burbeck. His wife died a few years ago; and his only son, the father of the surviving grandchild, died in Atlantic City, about three years ago. The testator was a life-long resident of the City of Reading, with the exception of about three years, when he resided in Atlantic City with his son. After the son's death, he came to Reading and lived here up to the time of his death. The evidence adduced at the hearing by the contestants, shows that the decedent was unwell for some time, and was attended by Dr. Ege, from 1912 to 1914. The doctor testified, that the decedent was not under his constant care, during this time, but came to his office off and on, when he was not in the Soldiers' Home; that he was suffering with diabetes insipidus, which brought on marasmus of the brain, making him incapable of transacting any business and resulting in hallucinations and lunacy; that he was so enfeebled in body and mind by the loss of blood and semen, that he was not competent to take care of his affairs; that his conduct, brought on by his physical and mental distress, showed that he did not appreciate the extent and character of his estate, nor the objects of his bounty. A number of witnesses were called, who testified that they knew the decedent for many years, having worked with him at different places in the city some years ago, and that in their judgment he was mentally weak. William Cole, who saw the testator about two or three times a week after he came back from Atlantic City, said, that his conversation was "drifting and not intelligent;" that the decedent complained to him about the Greens,—the beneficiaries in the will—being after him for money, and that he finally conveyed a house to one of them, on certain terms, after which they never came near him. On cross-examination the witnesses admitted, that Mr. Burbeck was not 'crazy, only he did not have the mind he should have had.' The principal witnesses for the contestants, besides Dr. Ege, were Mrs. Louisa Burbeck, the daughter-in-law and mother of the surviving grandchild, and her sister Meta Orff, who was at the Burbeck house in Atlantic City. Miss Orff testified, that the conduct of the decedent was "really unbecoming of any gentleman; that he left his bed room door open at the son's house in Atlantic City, and was lying uncovered in the bed, while the other occupants of the house passed the door; that he came down

stairs to the door virtually nude, and made inquiry concerning a woman; that while in his shirt sleeves, dirty, and poorly dressed, he came to the station when his son's body arrived here for burial, and said, "when is this thing going to come off;" that he acted in a very peculiar and silly manner at the cemetery; that when sent for a watermelon, he returned with clams; that at times he did not understand conversations with other people; that he would act very peculiarly around the house, taking dishes from the table, while the folks were dining, and do "things which other people would not think of doing."

Louisa Burbeck, the daughter-in-law, said the conduct of the testator at times was almost unbearable. She asserts, that his habits were filthy and repulsive; that he was dirty and oblivious to decency and self-respect; that he was suffering with delusions, about his deceased wife being after him and talking about him; that he tried to poison the whole family, saying he wanted to be the last of the Burbecks; and that many additional incidents detailed by her demonstrated that he was mentally unsound and did not know what he was doing.

It was also shown, that the Greens acquired some of his real estate before he died, for what can be regarded as an inadequate consideration; and that the letters offered are the product of an irresponsible and imbecile mind.

These were the leading characteristics of the case upon the part of the contestant, and in connection, therewith, most of the witnesses called by him testified, that in their opinion, the testator was not competent to make a will.

The proponents of the will have shown that it was written by L. W. Frankhouser, a real estate agent who knew the testator since August 4, 1912, when he started to attend to his pension vouchers; that the decedent, who often came to his place of business, dropped in one day and asked him to write his will; that the decedent furnished the data and the will was thereupon prepared and duly executed; that the decedent gave his reasons for not giving more to the granddaughter; that he expressed a desire to Mr. Frankhouser to transfer his property to some one for a certain amount of income each year, and wanted the witness to prevail upon Mr. Green to take it off his hands; and that from his dealings with the decedent, his conversations and observations with and of him during the years he came to his office and when the will was prepared and signed, the decedent was of sound mind and knew what he was doing.

J. Wilmer Fisher, Esq., a reputable member of the bar, detailed a most convincing array of facts, to prove the testamentary capacity of the testator. He said, that he met the

testator at his office on November 23, 1914, concerning the transfer of his property to Mr. Green; that the testator explained to the witness the terms which should govern the sale and sought his advice; that he pointed out to the testator the effect of the transfer according to the terms fixed by him, and that the testator replied, "he was satisfied and wanted it this way;" that he brought into the office the will written by Mr. Frankhouser and asked Mr. Fisher to examine it; that he said, he wanted to know whether the will would stand on account of the small bequest to his granddaughter; that the reason he was anxious to have it examined by a lawyer was, because he did not want any of his property to go to the Orffs, who would get it after the death of the granddaughter, if he left it to her, they having given him rough and bitter treatment. Mr. Fisher said, he called the testator's attention to the small bequest to the granddaughter and asked him whether he thought that was right, but that the testator was firm and unrelenting in his purpose, to virtually exclude her from getting any part of his estate, on account of her mother and aunt who had maltreated him on different occasions. Mr. Fisher also testified, that having a large practice in the Orphans' Court, he has made it a rule to be very observant of the mental condition and conduct of parties whose wills he prepares and on which he appears as a witness. He said, that the decedent dropped in at his office quite often, between November 15th, 1914, and January 1, 1915, that he was a good conversationalist, mentally keen and alert; that he was precise and definite in what he did; and that he did not discover the slightest signs of mental unsoundness in the testator.

The Nicholsons, with whom the decedent boarded up to the time he was sent to the hospital, and who spoke with him often and knew him for years; said he was mentally all right. Six other disinterested witnesses who knew the decedent for many years and who saw him on or about the time he went to the hospital testified, that his mind was good, and that he was perfectly able to look after his matters. That he was able to transact his business is evidenced by the fact that he had charge of his property and money right along and that no steps were taken to have him declared a weak-minded person. One of the six witnesses, viz: Ida T. Prince, recited a story in connection with this case that is actually sad and pathetic. Her description of meeting the testator on the day of the son's funeral at Atlantic City, while going to the house of mourning, when he said "They won't let us in;" their coming to the door which was locked and finally opened by Miss Orff, when she looked at the testator and said, "Have you got the paper; you can come in if you have got

the paper"—meaning thereby a note or mortgage which the decedent held against the son; that he said, "No, I haven't, but I can get it," she looked up and said "you have one-half hour's time to get it, if you bring it, you can get in," and his then turning away and not being permitted to view the remains of his only child, is indeed, touching. Mrs. Prince said, that while she was in the room where the son's body lay, a spray of flowers came in with the testator's card on them, and that they, Mrs. Burbeck and Miss Orff, sent them to the kitchen, until the paper came. This heartless conduct at the door is not denied by Mrs. Burbeck or Miss Orff, and is in fact admitted by them. There were other witnesses, including the Greens, who were the warm and intimate friends of the decedent and his wife for many years said, that the testator was of sound mind when the will in question was made.

We have thus endeavored to present sufficiently the testimony produced by the two sides affecting the mental condition of George H. W. Burbeck.

Under this testimony we do not see how a serious dispute arises as to the testamentary capacity of the testator. The proof of Mr. Burbeck's competency to make a will and manage his own affairs is so overwhelming, that no Judge would permit a verdict against this will to stand. The conduct of this testator in almost disinheriting his granddaughter, instead of making against his mental soundness is one of the strongest facts establishing his mental competency.

It is contended that this will is an unnatural one, and evidence of mental unsoundness and of undue influence. The testator felt, that he had been badly treated by Mrs. Burbeck and her sister, when they barred him from the house on the day of his son's funeral, and he then made up his mind that his estate should not get into their hands and even went to the extent of almost cutting out the granddaughter.

A will is unnatural in a legal sense only when it is contrary to what the testator from his known views, feelings and intentions would have been expected to make. When it is in accordance with such views it is never unnatural, however much it may differ from the ordinary actions of men in similar circumstances: *Morgan's Estate*, 219 Pa. 355-357.

There is no evidence of any undue influence in this case; and this allegation was not pressed at the argument.

The facts proving the testator's soundness of mind are so conclusive, while the opinions to the contrary are founded on facts so insufficient, that we do not see how a Court could permit a verdict against the will to stand.

We cannot, therefore, say that a serious dispute has arisen as to the testamentary capacity of George H. W. Burbeck.

and we must refuse to direct an issue to the Common Pleas as requested.

And now, April 28, 1917, the decision of the Register, dated April 16, 1915, admitting the said will to probate is sustained and the appeal therefrom is dismissed.

DEELMAN vs. SHERMAN et al.

Real Property—Covenants—Building Restrictions—Porches—Equity—Injunction.

1. In construing covenants or restrictions as to the use of property the circumstances and conditions surrounding the parties and property must be considered as well as the manifest objects of the grant or restriction. The intent of the parties and the object of the deed or restriction should govern, giving the instrument a just and fair interpretation.

2. In the construction of building restrictions, all doubts are to be resolved against the restriction, and in favor of the free and unrestricted use of the property.

3. Where a deed conveying a lot of ground contains the restriction that any building thereon erected must be built not less than twenty feet south of the building line of a street, and the purchaser builds a house entirely south of the twenty foot restriction and attaches a porch to the house extending beyond the twenty foot restriction, the Court will not award a mandatory injunction to compel the removal of the porch.

4. The jurisdiction for a mandatory injunction will not be exercised except in the clearest cases.

In the Court of Common Pleas of Berks County in Equity.
No. 1186 Equity Docket, 1917.

Mandatory injunction.

Bill, answer, replication and testimony.

Henry Maltzberger, Samuel E. Bertolet and F. S. Livingston for plaintiff.

Cyrus G. Derr for defendants.

FINDINGS OF FACTS.

Opinion by Wagner, J., November 23, 1918—

1. The plaintiff is the owner in fee of a certain lot of ground with two brick dwelling houses thereon erected, situate on the south side of Greenwich street, between Fifth and Sixth streets, being Nos. 510 and 512 Greenwich street, Reading, Pa., and the occupant of No. 510 Greenwich street.

2. Plaintiff purchased said real estate from Anne McL. Mickle and John L. Mickle, her husband, by deed dated June 11, 1914, deed recorded on June 19, 1914, in the Recorder's Office of Berks County, in Deed Book No. 430, page 140. Said deed provides that the "premises are conveyed subject to condition and restriction that any building erected thereon must be built not less than 20 feet south of the building line of said Greenwich street."

3. The buildings erected on this lot are built at least 20 feet south of the building line of Greenwich street, in strict accordance with said covenant.

4. On June 6, 1914, Spencer L. McIlvain, single, was the owner in fee of a lot of ground situated on the southeast corner of North Fifth and Greenwich streets, Reading, Pa., containing in front on Greenwich street 94 feet, more or less, adjoining on the west plaintiff's aforesaid property. The deed to Spencer L. McIlvain provided: "that any building thereon erected must be built not less than 15 feet south of the building line of said Greenwich street."

5. Plaintiff, prior to June 6, 1914, entered into an agreement to purchase from its owners the premises described in Finding of Fact 1, subject to the restriction contained in Finding of Fact 2. Plaintiff's entering into and complying with said agreement was conditioned upon his obtaining from said Spencer L. McIlvain an agreement covenanting for building restrictions of the property in Finding of Fact 4, similar to those appertaining to the other real estate fronting on Greenwich street. In accordance therewith on June 6, 1914, plaintiff and Spencer L. McIlvain entered into the following agreement:

Agreement, Spencer L. McIlvain and Teunis Deelman. Agreement, dated the sixth day of June, A. D. one thousand nine hundred and fourteen, between Spencer L. McIlvain, singleman, of the City of Reading, County of Berks, State of Pennsylvania, party of the first part, and Teunis Deelman, of the same place, party of the second part.

Whereas, The said party of the first part, by indenture dated June 28, A. D. 1898, and recorded in the Office of the Recorder of Deeds for the said County of Berks in Deed Book No. 257, page 60, acquired title in fee simple to a certain lot of ground, situate on the southeast corner of North Fifth and Greenwich streets in the said City of Reading, containing on said Greenwich street ninety-four (94) feet more or less, subject, however, to the following condition and restriction, to wit: The above lot of ground is conveyed subject to the condition and restriction that any building thereon erected must be built not less than ten feet east of the building line of said Fifth street, and not less than fifteen feet south of the building line of said Greenwich street.

And Whereas, Anne McIlvain Mickle, wife of John L. Mickle, of the City and County of Philadelphia, said state, by indenture dated November 30, A. D. 1910, recorded in the said Recorder's Office in Deed Book No. 386, page 183, acquired title in fee simple to a certain lot or piece of ground with two dwelling houses thereon erected, being Nos. 510 and 512 Greenwich street, in the said City of Reading, containing in front on said Greenwich street sixty-five (65) feet

more or less, and bounded on the west by the said lot of ground of the said party of the first part, subject, however, to the following condition and restriction, to wit: The aforesaid premises are conveyed subject to the condition and restriction that any building erected thereon must be built not less than twenty feet south of the building line of said Greenwich street, which lot or piece of ground and houses of the said Anne McIlvain Mickle, she and her said husband are about to convey to the said party of the second part,

And Whereas, The said parties hereto desire that the building conditions and restrictions along said Greenwich street appertaining to all the said real estate shall be the same throughout, now know all men by these presents, that the said party of the first part for himself, his heirs, executors, administrators and assigns, in consideration of the premises, and of the sum of one dollar in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and of the acceptance by the said party of the second part of the said intended conveyance to him, doth hereby covenant and agree to and with the said party of the second part, his heirs, executors, administrators and assigns, that the said lot of ground of the said party of the first part shall be henceforth subject to the condition and restriction that any building thereon erected must be built not less than twenty (20) feet instead of fifteen (15) feet as aforesaid south of the southern building line of said Greenwich street.

In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written. Sealed and delivered in presence of

Howard L. McIlvain,

Henry Maltzberger,

(Seal) Spencer L. McIlvain,

(Seal) Teunis Deelman.

State of Pennsylvania }
County of Berks } ss.

On the 6th day of June, A. D. 1914, before me, the subscriber, a Notary Public, residing at Reading, said county, personally appeared the above named Spencer L. McIlvain, and in due form of law acknowledged the above agreement to be his act and deed, and desired the same might be recorded as such.

Witness my hand and notarial seal the day and year aforesaid.

My commission expires March 1, 1915.

Howard L. McIlvain, (Seal)

Notary Public.

State of Pennsylvania }
 County of Berks } ss.

On the 6th day of June, A. D. 1914, before me, the subscriber, United States Commissioner for the Eastern District of Pennsylvania, residing at Reading, said County, personally appeared the above named Teunis Deelman and in due form of law acknowledged the above agreement to be his act and deed and desired the same might be recorded as such.

Witness my hand and official seal the day and year aforesaid.

Henry Maltzberger. (Seal)

United States Commissioner for the Eastern District of Pennsylvania, at Reading.

My commission expires July 1, A. D. 1917.

6. On July 13, 1916, Samuel M. Sherman, one of the defendants, purchased by deed from the heirs of Spencer L. McIlvain, then deceased, the lot of ground described in Finding of Fact 4, excepting the southern 10 feet thereof fronting on Fifth street, the deed reciting "the aforesaid lot or piece of ground is conveyed subject to the condition and restriction that any building thereon erected must be built not . . . less than 20 feet south of the building line of said Greenwich street." He then proceeded to erect and construct a building thereon fronting on North Fifth street, with its north elevation on Greenwich street, said building to be conveyed, with the appurtenant portion of the lot of ground consisting of the entire front on Greenwich street, with 50 feet fronting on North Fifth street, to Edward H. Knerr, one of the defendants.

7. On August 1, 1916, defendant, Samuel M. Sherman and wife, by deed, conveyed the lot described in Finding of Fact 6, together with the dwelling house then being erected thereon, to Edward H. Knerr, the other defendant, subject to the condition and restriction "that any building erected on said lot . . . must be built not less than . . . 20 feet south of the southern building line of said Greenwich street."

8. After the purchase of said property by Edward H. Knerr, Samuel M. Sherman finished the construction of said dwelling house. This house lies entirely south of the 20-foot restriction on Greenwich street, the nearest approach of the north wall thereof being .25 of a foot south of the 20-foot restriction line. The front of the house faces Fifth street on the west. On the Fifth street side is a covered porch. From this porch there extends, along the Greenwich street side, against the north wall of the house, a structure, the floor of

which is on a level with, and is a continuation of the floor of the front porch. It affords the only passageway or walk to a door on the Greenwich street side of the house. It is 34'6" long and 7' wide. It extends to the north beyond the 20-foot restriction line, at the eastern end a distance of 5.2' and at the western end 5.07'. It rests upon an 18" wide stone foundation wall built along the outer edge thereof within the ground. The wall is continued above the surface of the ground and is built of brick, with an Indiana limestone coping. The floor is made of concrete, on which is laid tile to conform with the tiled floor of the front porch. This bordering wall is 4' above the ground, and extends 1.8' above the floor. It has four pillar bases or pilasters, 18¾" square. It has no steps to the ground. It is like the front porch in appearance, materials used, and in construction, except in roof, supporting columns and steps. Its purpose is to furnish a walk or passageway from the front porch to the side door opening towards Greenwich street, and is so built as to conform to the general architecture of the house and front porch.

9. On April 1, 1869, Aaron Bright and Roxlena, his wife, granted to William McIlvain, Sr., Morton C. McIlvain, and William R. McIlvain, inter alia, the entire tract of land on the south side of Greenwich street, between Fifth and Sixth streets.

10. William McIlvain, Morton C. McIlvain, and William R. McIlvain, on March 28, 1890, conveyed house and lot, No. 524 Greenwich street, on the south side thereof, to Philip Fertig, subject to this building restriction: "It is a consideration and intended to form part of this indenture that the said Philip Fertig, his heirs or assigns, shall in rebuilding or altering stand the building or buildings so erected 20 feet back from the front house line on Greenwich street."

11. William McIlvain, Morton C. McIlvain, and William R. McIlvain, on February 18, 1890, conveyed to Mary T. Snook, house and lot of ground on the south side of Greenwich street, No. 522, subject to this building restriction: "It is a consideration and intended to form a part of this indenture that in rebuilding or altering the building or buildings so erected or altered shall stand back at least 20 feet from the front house line on Greenwich street."

12. Sidney H. McIlvain and Howard L. McIlvain, executors of Morton C. McIlvain, deceased, and Spencer L. McIlvain, on June 25, 1898, conveyed to William R. McIlvain a five-ninth interest in two houses and the lots of ground upon which the same were erected, on the south side of Greenwich street, being Nos. 518 and 520, subject to this building restriction: "Subject to the condition and restriction that any build-

ing erected thereon must be built not less than 20 feet south of the building line of said Greenwich street."

13. Morton C. McIlvain, William R. McIlvain and Spencer L. McIlvain, on November 21, 1894, conveyed to Charles H. Stevenson a house and lot located on the south side of Greenwich street, No. 516, subject to this building restriction: "It is a condition and intended to form a part of this indenture that no building shall be erected on said premises within a distance of at least 20 feet from the front house line on Greenwich street."

14. William McIlvain, Morton C. McIlvain, and William R. McIlvain, on April 22, 1887, conveyed to Clifford Pomroy a certain lot upon which a house was not yet built, being now 514 Greenwich street, situate on the south side of Greenwich street, said lot having a frontage along said Greenwich street of 28 feet, subject to this building restriction: "It is a part of the conditions that the said Clifford Pomroy shall stand his house back from the street house line in range with the houses Nos. 510 and 512 Greenwich street now erected."

15. William R. McIlvain and Spencer L. McIlvain, on June 25, 1898, conveyed to Sidney H. McIlvain and Howard L. McIlvain, executors of Morton C. McIlvain, deceased, a five-ninth interest in two dwelling houses, together with the lots of ground upon which the same were erected, situate on the south side of Greenwich street, being Nos. 510 and 512, subject to this building restriction: "The aforesaid premises are conveyed subject to condition and restriction that any building erected thereon must be built not less than 20 feet south of the building line of said Greenwich street."

16. Howard L. McIlvain, surviving executor of Morton C. McIlvain, deceased, on November 30, 1910, by deed conveyed to Anne McIlvain Mickle, grantor of plaintiff, the property described in Finding of Fact 1, subject to said building restriction.

17. Houses 524, 522, 520, 518, 516, 512, and 510 were erected by William McIlvain, Sr., Morton C. McIlvain, and William R. McIlvain, or their heirs. The lots upon which they are built constitute a part of the tract described in Finding of Fact 9.

18. The front house wall of 524 Greenwich street is built $4\frac{7}{8}$ " south of the 20-foot restriction. The front house wall of 522 Greenwich street is built $2\frac{3}{4}$ " south of the 20-foot restriction. 522 and 524 are twin houses. They have a joint porch in front. The porch at 524 extends 6'2", and the

porch at 522 extends $6'1\frac{7}{8}"$ over and north of the 20-foot reserve line.

19. The front house wall of 520 Greenwich street is 3' south of the 20-foot reserve line, and that of 518 is $3'1\frac{1}{8}"$ south of the 20-foot reserve line. These two properties have a joint front porch extending over the 20-foot reserve line north at 520, $3'3\frac{1}{2}"$, and at 518, $3'3\frac{5}{8}"$.

20. The front house wall of 516 Greenwich street is $3'2\frac{3}{4}"$ south of the 20-foot reserve line at the east end, and at the west end, where the porch is located, 4'8" south of the 20-foot reserve line. This property has a front porch which extends over the 20-foot reserve line north 3'1".

21. The front house wall of 514 Greenwich street, not erected by the McIlvains or their heirs, but by a subsequent purchaser, is located $3'2\frac{5}{8}"$ south of the 20-foot reserve line. This has a porch along the whole front of the house, extending over and north of the 20-foot reserve line more than 6 feet.

22. The front house wall of 510 and 512 nearest to the reserve line is at one corner $3'3\frac{1}{4}"$ south, and at the other corner $3'5\frac{1}{8}"$ south of the 20-foot reserve line. The porches of these two properties are located, the one at the northeast corner of 512, and the other at the northwest corner of 510, at which places there is a sufficient recess to the south of the main building for the location of these porches. The front line of the porches are in the line with the front wall of the main buildings.

23. William M. McIlvain, Morton C. McIlvain, William R. McIlvain, and their heirs, in the erection of these houses, with front porches attached, constructed the main front wall of the houses to conform with a 20-foot line. These properties were subsequently conveyed with the house buildings made subject, by deed, to this line. The porches were erected without reference to this 20-foot reserve line.

24. This conformity of the house buildings is shown by photograph, plaintiff's Exhibit "C."

25. The appearance of the structure complained of is shown by photograph, plaintiff's Exhibit "E."

DISCUSSION.

Plaintiff, inter alia, asks for a mandatory injunction directed against the defendants to remove a certain structure attached to the northern side of Edward H. Knerr's dwelling house, which structure plaintiff contends is a part of the building, and as such is covered by an agreement containing certain building restrictions to which defendants' property is subject, said agreement having been entered into on June

6, 1914, by plaintiff with Spencer L. McIlvain, predecessor in title to the premises now owned by Edward H. Knerr, one of the defendants. The structure complained of is fully described in our Findings of Fact.

Defendants defend on the ground: First, that even if this structure is a porch, as claimed by plaintiff, and may generally be considered a part of the building, it is not covered by the restriction for the reason that when this agreement was entered into the word "building" was used in a restrictive sense, and had reference only to the main dwelling house, apart from any porch; second, that the structure is not a part of the building, and for that reason it is not included within the restriction.

Spencer L. McIlvain is one of the heirs of William McIlvain, Sr., who, with Morton C. McIlvain and William R. McIlvain, were the original owners of the entire tract of land on the south side of Greenwich street between Fifth and Sixth streets, of which the properties in suit are a part. Plaintiff in his original bill twice sets forth the purpose of this building restriction, where, in paragraph 5 he alleges:

First—"Your Orator's entering into and complying with said agreement was conditioned upon his obtaining from said Spencer L. McIlvain an agreement covenanting for building restrictions similar to those appertaining to the other real estate fronting on Greenwich street."

Second—"It was covenanted and agreed that whereas the parties desired that building restrictions appertaining to all the real estate fronting on the south side of Greenwich street should be the same," etc.

If the purpose of the restriction was as is thus twice stated by the plaintiff, and the agreement effected this purpose, then it is plain that defendants' lot is bound by building restrictions similar to those of all the other properties on the south side of Greenwich street that fronted on Greenwich street; that is, similar to the building restrictions to which Nos. 510, 512, 514, 516, 518, 520, 522, and 524, and the vacant lot adjoining No. 524 on the east are subject.

The purpose of the agreement entered into on June 6, 1914, between Spencer L. McIlvain and Teunis Deelman, plaintiff, is thus stated in the agreement:

"The said parties hereto desire that the building conditions and restrictions along said Greenwich street appertaining to all the said real estate shall be the same throughout."

In plaintiff's first bill he construed the words "along said Greenwich street appertaining to all the said real estate shall be the same throughout" to mean that it included not only plaintiff's and defendants' real estate, but all the real estate on the south side of Greenwich street fronting on said street. He amended the 5th paragraph of the bill by inserting "said,"

so that the one clause now reads "to the said other real estate," etc.; and the other clause reads "to all the said real estate fronting on the south side of Greenwich street," etc. By this amendment he contends that the purpose and the effect of the agreement was merely to make the building restrictions of defendants' and plaintiff's properties the same. Taking into consideration the conditions as they existed at the time that this agreement was entered into, with the agreement itself, especially that part where it provides that the "restrictions . . . shall be the same throughout," we consider plaintiff's first construction to be the proper one. It was only when the Court called attention, after the hearing in this case, that no testimony had been given relating to the building restriction that had been placed upon the real estate fronting on the south side of Greenwich street, that plaintiff amended his bill.

Even if this restricted construction as now contended for is correct, it will be necessary to determine what the restrictions of plaintiff's properties 510 and 512 Greenwich street were under the deed given to him before we can decide what is meant by the word "building" as applied to defendants' property. It seems plain that when the McIlvains, the predecessors in title of the properties fronting on the south side of Greenwich street, made the 20-foot reserve building line, that though they used different words to establish it in the deeds to their grantees, their intent and purpose was to make the building restrictions the same to all properties on the south side of Greenwich street fronting on said street, and included in said restriction plaintiff's properties 510 and 512 Greenwich street. In 13 Cyc, page 714, we have: "In construing covenants or restrictions as to the use of property the circumstances and conditions surrounding the parties and property must be considered as well as the manifest objects of the grant or restriction. So the intent of the parties and the object of the deed or restriction should govern, giving the instrument a just and fair interpretation." In *Murphy vs. Ahlberg, et al., ex'rs*, 252 Pa. 267, on page 269, we have: "The general rule is that the language of a deed should be interpreted in the light of the apparent object or purpose of the parties and of the conditions existing when made: *Meigs vs. Lewis*, 164 Pa. 597." See also *LaBelle Coke Co. vs. Smith*, 221 Pa. 642, 649; *McCloskey vs. Kirk*, 243 Pa. 319, 324; *Landell et al. vs. Hamilton et al.*, 175 Pa. 327; *Equitable Gas Co. vs. Limegrover*, 54 Pa. Superior Ct. 250, 256; *Keiser vs. Reading S. R. Est. Co.*, 43 Pa. Superior Ct. 130, 146; *Thatcher vs. West Chester Street Railway Co.*, 35 Pa. Superior Ct. 615. What was meant by the use of the word building must be determined in view of the circumstances at the time, and the interpretation the parties themselves placed upon it:

Beedy vs. Nypano R. R. Co., 250 Pa. 51, 57; Wright vs. Gas Co., 2 Pa. Superior Ct. 219; Thatcher vs. West Chester Street Railway Co., *supra*.

William McIlvain, Sr., et al., and their heirs, owned this property on the south side of Greenwich street, and built thereon houses with front porches. The front wall of every one of these houses was located south of the 20-foot reserve line. Every one of the front porches, except that to plaintiff's property, extended over this 20-foot restriction for a distance of from 2 to 6 feet. Therefore, when they sold these properties, with the front wall of the house conforming with the 20-foot building restriction, with the porches extending over the 20-foot reserve line, and provided that if the said grantees should rebuild or alter they should stand their building so erected, 20 feet back from the front house line, as in some of the deeds, or as in others, at least 20 feet back from the front house line, or as in another, not less than 20 feet south of the building line of said Greenwich street, it is very evident that only this front wall of the main building was intended,—that is, the "building" restricted was the main dwelling, and did not include the porch. Otherwise you would have this condition: when the necessity for the rebuilding of these wooden porches came, the owners could not rebuild by replacing them in their old positions, but had to place them south of the 20-foot reserve line. This could not be done without removing the front wall of the brick houses.

It was contended by plaintiff's counsel that when the condition of these frame porches became such that they would require rebuilding, the result would be that on account of the brick houses being in the way of rebuilding, these houses, therefore, would have to remain without porches until the brick houses themselves were taken away, or the front walls thereof moved back so as to be able to place a porch again at the front of these buildings. Such an interpretation of the intent of these parties seems to us to be so unreasonable as to hardly admit of serious consideration. It seems clear, by the course of conduct of the prior owners of these properties on the south side of Greenwich street, and by the nature of the reservations that they imposed upon them when they sold them, with the front porches not governed by the restriction, that what was intended was merely to establish this 20-foot reserve line as they in the erection of these houses had themselves observed it, so that to the north of it no main building could be erected. That is, only the front wall of the main house had to be at least 20 feet south of the house line on Greenwich street, and the word "building" is used in the restrictive sense as applying to the main buildings of the respective properties. When, then, 510 and 512 were

conveyed to Teunis Deelman, the word "building" in his restriction applied only to the front line wall of the main building, and this also was the sense in which it was used in the agreement of June 6, 1914. That they so interpreted the word "building" is also shown by the conveyance of William McIlvain et al., on April 22, 1887, of 514, adjoining plaintiff's property on the east, where the words of the restriction are: "It is a part of the conditions that the said Clifford Pomroy shall stand his house back from the street house line in range with the houses Nos. 510 and 512 Greenwich street now erected." This shows that only the house building and not the porch was included. This is further strengthened by the fact that the McIlvains, although still the owners of the properties on both sides of 514,—that is, 516 and 512—permitted the purchasers of 514 to erect the front porch of the house over the 20-foot reserve line. It is consequently immaterial in the consideration of the word "building" whether we take plaintiff's bill as it originally was in paragraph 5, or as amended, because both constructions placed upon it by plaintiff lead to the same conclusion. When all the circumstances attending all the properties on the south side of Greenwich street are taken into consideration, all uncertainties as to the meaning of the word "building" are removed. "In the construction of building restrictions, all doubts are to be resolved against the restriction, and in favor of the free and unrestricted use of the property:" *Johnson vs. Jones*, 244 Pa. 386; *McCloskey vs. Kirk*, 243 Pa. 319. In *Willock vs. Arensberg*, 51 Pa. Superior Ct. 73, on pp. 77, 78, we have: "If the uncertain significance of the restrictive words be most liberally construed, they would apply to the main building line, and do not constitute such a restrictive covenant as would forbid a reasonable porch extending but four to six feet beyond the building."

This is a request by the plaintiff for a mandatory injunction. The jurisdiction for a mandatory injunction is not to be exercised except in the clearest cases: *Leisenring vs. Penna. Lighting Co.*, 59 Pa. Superior Ct. 202. Under this view of the case it is not necessary for us to consider defendants' second defense, namely, that the structure complained of is not a part of the building, and, for that reason, is not covered by the restriction of 20 feet.

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT AND FINDINGS OF LAW.

The plaintiff has filed sixteen requests for Findings of Fact and ten requests for Findings of Law. Of the requests for Findings of Fact, twelve are refused, as shown by the answers respectively to said requests, upon the ground either

as not being material to the issue, or as not based upon the evidence. Four are affirmed either in full or in part, as shown by the answers thereto. The first request for Findings of Law is affirmed, and the others are refused.

DEFENDANTS' REQUESTS FOR FINDINGS OF FACT AND FINDINGS OF LAW.

The defendants filed five requests for Findings of Fact. The second and third of these are affirmed in part; the others are refused for the reasons stated in the separate answers to these requests.

They also filed two requests for Findings of Law. The first of these is affirmed in part, and the other is refused, as shown by the answers thereto.

FINDINGS OF LAW.

1. The McIlvains and their heirs, in creating the restriction in their deeds, used the word "building" in a restrictive sense so that it applied only to the house proper. They did not use the word "building" to include the front porches to the houses.

2. The erection by the defendants of the structure complained of by the plaintiff is not prohibited either by the deed of Anne McL. Mickle and John L. Mickle, her husband, to plaintiff, dated June 11, 1914, or by the agreement entered into between the plaintiff and Spencer L. McIlvain dated June 6, 1914.

3. The erection of the structure by defendants does not violate any right of the plaintiff.

4. The bill must be dismissed.

5. The costs of this proceeding must be paid by the plaintiff.

AND NOW, November 23, 1918, the Prothonotary is directed to enter a decree nisi in accordance with the foregoing decision, and forthwith to give notice thereof to the parties or their counsel of record, sec. reg.

COMMONWEALTH vs. MITCHELL.

Criminal Law—Newly Discovered Evidence—New Trial—Practice, Q. S.

In the consideration of a motion for a new trial on the ground of newly discovered evidence, the Court will make the rule absolute where the legitimate effect of such evidence, if believed by the jury, would require a different verdict. On such a motion the question is (supposing all the testimony, new and old, before another jury), not whether they might, but whether they ought to give a different verdict.

In the Court of Quarter Sessions of Berks County.

No. 112 September Sessions, 1918.

Surcharge assault and battery. Verdict of guilty.

Rule for new trial.

D. E. Schroeder for defendant and rule.

David F. Mauger, Asst. District Attorney, for Commonwealth.

Opinion by Endlich, P. J., November 23, 1918—The defendant was indicted for assault and battery on the prosecutor's child, and convicted. The fact that an assault and battery had been committed was not disputed. The defence was that it was not committed by the defendant, who, it was insisted, was not at the scene of it at all. The only witness who professed to have seen the occurrence was the prosecutor's wife, the mother of the child attacked; and her testimony identifying the defendant as the guilty person is to be judged of in connection with her further statement that immediately after the assault the defendant went into a nearby house occupied by a family by the name of Stewart. If the witness was mistaken in that, she was probably mistaken about the identity of the person who committed the assault and battery. The defendant now offers to show, and submits depositions indicating that she can show, by the persons occupying the house in question that she was not there at all about the time of the assault and battery as alleged by the prosecutor's wife, and she excuses her failure to produce such evidence at the trial by her ignorance of the circumstance that any claim would be made that she had gone to that house. Obviously this is not simply cumulative or corroborative or impeaching evidence, unavailing, under the familiar rule, as newly-discovered evidence warranting a new trial. It may indeed incidentally or indirectly cumulate, corroborate and impeach. But in view of the Commonwealth's evidence just referred to, its main office and direct effect are to deny the identity of the assailant with the defendant and therefore the truth of the charge made against her by proof of her absence from the place where she is said to have been immediately after the assault. Neither is it such evidence as it was imperative upon the defendant to adduce at the trial or be barred from adducing now. If she was not in the Stewart house, she could not have known or surmised that the Commonwealth would allege her entrance into that house, and consequently was not required to be prepared to meet this allegation, but excusable for not meeting it. It is, moreover, evidence which, if submitted to and believed by the jury, ought

to bring about a different verdict. In short, it is sufficient to call for a new trial under the strict doctrine of *Com. vs. Flanagan*, 7 W. & S. 415, 423-4, and numerous cases following it. And this is all the more palpably so when it is remembered that the Commonwealth's case depends upon identification testimony, which by many respectable authorities is deemed to be ordinarily inconclusive and dangerous when standing alone. We think that justice to the defendant demands the granting of a new trial in this case, and therefore—

The rule to show cause is made absolute.

LEBO vs. READING TRANSIT & LIGHT CO.

Negligence—Excessive Verdict—New Trial—Practice, C. P.

1. Where the jury's verdict in an action for damages for personal injuries due to the alleged negligence of the defendant is for a sum that is beyond what is usual and needful for the purposes of compensation for the plaintiff's suffering and pecuniary loss, past, present and future, the Court will order a new trial.

Negligence—Declarations of Employee—Res gestae.

2. Statements and declarations made by defendant's employee immediately after an accident which relate directly to the occurrence and which are essentially connected therewith are admissible as part of the *res gestae* provided that they are statements of fact and not of mere opinion.

Negligence—Contributory Negligence—Action in the Presence of Imminent Danger.

3. A plaintiff cannot be considered guilty of contributory negligence when, through no fault of his own, he is placed in a position imminently dangerous to his immediate safety, even though his actions may not have been guided by the good judgment which under ordinary circumstances would have been necessary.

In the Court of Common Pleas of Berks County.

No. 87 May Term, 1917.

Trespass. Verdict for plaintiff for \$8,000.

Rule for new trial and judgment non obstante veredicto.

C. H. Ruhl for defendant and rule.

Samuel E. Bertolet and Robert Grey Bushong for plaintiff.

Opinion by Endlich, P. J., December 9, 1918.—This is an action for personal injury alleged to have been inflicted on the plaintiff through negligence of the motorman in charge of defendant's trolley car. The jury rendered a verdict for plaintiff of upwards of \$8,000, and the defendant has obtained these rules for a new trial and judgment n. o. v. under Act 22

Apr. 1905, P. L. 286. Defendant having submitted no evidence, every inference favorable to the plaintiff's recovery and capable of flowing from competent evidence in the case is for present purposes to be accepted as drawn by the jury and as correct in point of fact.

On Oct. 12, 1916, about 3.30 p. m., the plaintiff was driving a one-horse baker's wagon with glass front and glass sliding doors, all open, at a slow trot and somewhat down-grade on Robeson street westwardly toward Tenth. He knew that on Tenth street the trolley cars run north. When his horse reached the eastern foot-crossing of Tenth street, plaintiff, sitting in the middle of the wagon, had a view south on Tenth of about 100 feet, the house-line cutting off anything beyond that. He looked south, but saw and heard nothing of an approaching car. Going on without stopping, he then looked north for traffic that might be moving towards him from that side. Seeing none, and still proceeding at a slow trot, and his horse having "reached the track," gotten "almost on the track," plaintiff looked again to the south and saw defendant's car eight or nine feet away coming towards him, indeed, as he says, "practically on top of" him. He reasoned that if he turned south he would "turn into the car," and if he turned north "the car would run into the team," and that his only chance of escape was to go right on, which he did. The trolley car struck the wagon between the front and hind wheels, partly demolishing it, dragging the plaintiff about 30 feet until the car was brought to a standstill, and injuring him painfully and in part probably permanently. The car had not stopped at Spring street, the next street south of Robeson street, nor, as it approached the intersection of Tenth and Robeson streets, was its speed slackened. When plaintiff first looked south the car must have been about half-way between Spring and Robeson streets, and its speed going towards Robeson street was such as to cover a distance of about half a block in the same time in which plaintiff drove about 30 feet. Immediately after the accident, as soon as the plaintiff was gotten from under the car, the motorman said of the occurrence that he could not help it, "the brake didn't hold" or "wouldn't work."

The offer of plaintiff to prove the motorman's statement just mentioned was objected to when made and the admission of it is now complained of as error. It was received as part of the *res gestae*. Among the many cases illustrating the doctrine concerning the admissibility of declarations by an employee as *res gestae* in actions of this kind, it is enough to refer to *Coll. vs. Transit Co.*, 180 Pa. 618, where, reversing the *nisi prius* court, it was held, in a case of fatal injury through the alleged negligence of the motorman of the defendant's trolley car, that his declaration immediately after

the accident to the effect that he might have stopped the car in time to avoid the collision, but supposed that a lineman who had jumped from the car and run ahead would remove the deceased from the track (where he had fallen in an effort to get out of the way) before the car reached him, was admissible as part of the *res gestae*, as explained and defined in the opinion of Mr. Justice Fell. There is no conflict between that decision, or the line of decisions to which it belongs, and those which deny the power of an employee to bind his employer by the expression of an opinion that, e. g., the construction or condition of the instrumentality operated by him was defective: see *Steamship Co. vs. Landreth*, 108 Pa. 264; *Shaffer vs. Haish*, 110 id. 575. The present case falls within the principle of the former, not of the latter category of decisions. The testimony touching the motorman's declaration that the brakes on defendant's cars generally were inefficacious was rejected or stricken out, and all that was admitted was proof of his statement that the brake of this car, when he applied it, failed to hold,—a statement of fact, not an opinion,—and one which related directly to the occurrence at the time and was essentially connected with it as part of the *res gestae*. That it had a bearing on the question of defendant's negligence need not be pointed out.

Nor is there a lack of other evidence of negligence on defendant's part. If the plaintiff had a view south of 100 feet from the foot-crossing, it may be inferred that the motorman could see and ought to have seen the plaintiff going on towards the track when they were considerably more than 100 feet apart. That the motorman did in fact see the plaintiff is involved in his statement about trying to stop the car. The plaintiff's going on at a trot may have been notice to the motorman of plaintiff's intention to go on and cross the track without stopping (see *Callahan vs. Traction Co.*, 184 Pa. 425, as explained in *Smith vs. Traction Co.*, 187 id. 110, 112). If so, the motorman was of course bound to guard against a collision if he could. But when it comes to the inquiry what his precise duty in the premises was, it cannot be laid down as a matter of law that he was obliged to bring the car to a standstill the moment he saw the plaintiff, or at any given point of time or place. Indeed there is, as in most cases, no rule of law to be applied by the Court, to ascertain what the motorman should have done, if anything. Possibly the situation, as it presented itself to him, demanded of him no more than the sounding of the gong, which from plaintiff's testimony that he heard nothing it would appear deducible was not done. Possibly something more was required from the motorman in the exercise of due care. Manifestly it must be for the jury to determine whether he fell short of performing his whole duty in approaching the intersection of Tenth and Robeson

streets as he did, in the face of imminent danger of collision: see *Mead vs. Traction Co.*, 54 Pa. Super. Ct. 400, 405; 63 id. 76, 78, 81, and also *Ry Co. vs. Boudrou*, 92 Pa. 475, 481.

And so was the question of plaintiff's contributory negligence one for the jury. There is no room for doubting the imperativeness of the rule that one about to cross a street railway is bound to look for danger and keep up his vigilance all the way to and upon the track, and that failure to do so is negligence per se. This is settled by a great number of decisions, among which may be mentioned *Ehrisman vs. Ry. Co.*, 150 Pa. 180; *Wheelahan vs. Traction Co.*, *ibid.* 187; *Darwood vs. Traction Co.*, 189 id. 592; *Burke vs. Traction Co.*, 198 id. 497; *Pieper vs. Traction Co.*, 202 id. 100; *Keenan vs. Traction Co.*, *ibid.* 107; *Moser vs. Traction Co.*, 205 id. 481; *Smathers vs. Ry Co.*, 226 id. 212; *Talley vs. Traction Co.*, 227 id. 393; *Ervay vs. Traction Co.*, 240 id. 440; *Moses vs. Ry Co.*, 258 id. 537; *Cliff vs. Traction Co.*, 52 Pa. Super. Ct. 502; *Storage Co. vs. Traction Co.*, 62 id. 568; *Bready vs. Transit Co.*, 68 id. 298. He may even be bound to stop, if that is necessary for safety; see *Omslaer vs. Traction Co.*, 168 Pa. 519; *Speakman vs. Traction Co.*, 42 Pa. Super. Ct. 558. But there is no fixed and invariable duty upon him to stop and listen, as well as look. Whether a necessity for that existed in any given case is for the jury under all the circumstances,—with this qualification, that, on the one hand the jury cannot hold a party to a higher standard of care than the law requires, and cannot find anything to be negligence which is less than a failure to discharge a legal duty: *Brague vs. Ry Co.*, 192 Pa. 242, 251, and that, on the other hand, what the law calls negligence the jury cannot call something else: *Gangawer vs. R. R. Co.*, 168 id. 265, 270. The plaintiff in this case looked south when he was about 30 feet from the track. It was his duty to look north also, and he did so. Then he looked south again. In the meanwhile he was approaching the track on a slow trot. It cannot have taken him more than a few moments to reach it. Virtually he may have been busy looking one way or the other all the time he was going towards the track. At any rate, it can hardly be declared as a matter of law by the Court that he did not keep up his vigilance right along until he reached the track. Then when he looked south the second time and saw the car "practically on top of" him, he, as his testimony ought perhaps to be regarded as fairly suggesting and the jury as entitled to believe, may have become bewildered or confused by the imminence of the peril about to overwhelm him and have chosen what at the moment seemed to him to promise most in the way of escape, i. e., to keep going. If in so doing his judgment may not have been the best, yet it is to be remembered that, in a sudden emergency not brought about by something wrong in the party's own conduct, he is not held

to the same good judgment as ordinarily, and whether what he did or did not do under such conditions ought to be imputed to him as negligence or not becomes a question for the jury. This was held in *Bard vs. Ry Co.*, 199 Pa. 94, and has been held so often and at least as lately as *Wingert vs. Ry Co.*, 262 id. 21, that it is unnecessary to enumerate the cases.

It would seem that, in the matters treated of there is not enough to warrant the granting of a new trial and too much to permit the entry of judgment non obstante veredicto. There remains defendant's objection founded upon the size of the verdict. It must be conceded that it is beyond what is usual and beyond what appears needful for the purposes of compensation for the plaintiff's suffering and pecuniary loss, past, present and future. A careful examination of the case, however, has led to the conclusion that this objection cannot properly, and therefore ought not to be attempted to, be remedied by the Court reducing the verdict. In order to justify that there ought to be an adequate basis in the evidence for it affording a safe measure of reduction: see *Stauffer vs. Reading*, 208 Pa. 436, 437. The evidence here does not furnish that basis and measure for a reduction, and the latter would appear as, and could hardly be other than, an arbitrary act on the part of the Court. Moreover, it must not be overlooked that in an action like this a plaintiff on the question of his damages has the constitutional right to have them assessed by a jury: *Bradwell vs. Ry Co.*, 139 Pa. 404, subject to the power of the Court to set aside the verdict if clearly too great or too small. We are of opinion that in this instance the ends of justice will be best served by the submission of this case to a second jury. Further discussion of it at this time with reference to the quantum of the damages is therefore inadvisable: see *McKnight vs. Bell*, 135 Pa. 358, 373.

The rule for judgment n. o. v. is discharged and the rule for a new trial is made absolute.

COMMONWEALTH vs. WEIMERT.

Criminal Law—Fornication and Bastardy—New Trial.

After conviction on the charge of fornication and bastardy, a new trial will be granted where the verdict is palpably contrary to the evidence and the weight of the evidence, and unjust to the defendant.

In the Court of Quarter Sessions of Berks County.

No. 63 June Sessions, 1918.

Surcharge fornication and bastardy. Verdict of guilty.

Rule for new trial.

Chas. Wm. Matten for defendant and rule.

Thomas K. Leidy for the prosecutrix.

Opinion by Endlich, P. J., December 9, 1918.—The defendant in this case was indicted on a charge of fornication and bastardy. At the trial the jury rendered a verdict of guilty, whereupon this rule for a new trial was obtained by defendant. The admissibility of the jury's finding depends upon the defendant's presence at certain places on certain days. On this subject there was evidence on both sides. But the testimony and circumstances making against the Commonwealth's contention on that point were so strong, even disregarding defendant's own deposition, that, if what was alleged on defendant's side was not so conclusively established as, according to *Newhard vs. R. R. Co.*, 153 Pa. 417, 420, to require the Court, in the due administration of justice, to treat it as the truth, yet in our opinion it ought at least to have raised a reasonable doubt as to the defendant's guilt. The Commonwealth's story was that the defendant and the prosecutrix met at a fair in Bechtelsville, in this county, on Sept. 8, 1917, and that the act charged against the defendant was committed on the night of Sept. 9 to 10. Besides an absolute denial of guilt by the defendant, the evidence adduced by him was that there was no fair at Bechtelsville until Oct. 20, and that the parties then met for the first time. The child was born on Apr. 21, 1918. In the medical attendant's judgment it was not quite a full-term child and might have been conceived about Sept. 9, 1917. But there is abundant and credible proof that the defendant was not in this county on the date last mentioned nor came here at all until Sept. 18. Moreover, it strikes one as strange and hard to believe that the prosecutrix surrendered to the defendant the very next day after his first introduction to her. On the authority of what is said in *Grant vs. Com'th*, 71 Pa. 495, 505, it would seem that justice to the defendant demands the granting of the application made by him in this case. Whatever may be found to be the effect of the death of the prosecutrix mentioned by counsel at the argument of the rule, since its entry, it cannot constitute a sufficient reason for upholding a verdict which appears to be palpably contrary to the evidence and the weight of the evidence; and unjust to the defendant.

The rule to show cause is made absolute.

SIEGFRIED vs. SIEGFRIED.**Divorce—Alimony Pendente Lite—Counsel Fees—Practice, C. P.**

1. Whilst the right to an allowance of alimony pendente lite and counsel fees is not an absolute one, but rests in the sound discretion of the Court, it is the uniform practice in Pennsylvania to make such allowances according to the circumstances of the parties whether the wife be the libellant or respondent.

2. Ordinarily on an application for alimony pendente lite the merits of the case will not be inquired into, but where there is conclusive proof of the wife's adultery or her commission of some such grave offence, or of a state of facts which would preclude the possibility of a decree of divorce in favor of the wife petitioning, alimony will be refused, though it seems that counsel fees are still to be allowed.

In the Court of Common Pleas of Berks County.

No. 107 August Term, 1918.

Divorce. Rule for alimony pendente lite and counsel fees.

George Eves, W. Kerper Stevens and Ralph H. Mengel for respondent and rule.

Randolph Stauffer and John B. Stevens for libellant.

Opinion by Endlich, P. J., December 21, 1918—This is an action for divorce instituted July 12, 1918, by a husband against his wife. In her answer to the libel she denies the allegations made against her and asks for a jury trial. Moreover, she has obtained this rule for alimony pendente lite and counsel fees, averring her own want of resources and the libellant's ability to pay. Whilst the right to such an allowance is not an absolute one, but rests in the sound discretion of the Court: see cases cited in Shoemaker vs. Shoemaker, 5 Distr. R. 449, yet it has been the very uniform practice in Pennsylvania to make such allowances according to the circumstances of the parties whether the wife be the libellant or, as here, the respondent: see Breinig vs. Breinig, 26 Pa. 161; Powers' App., 120 id. 320; Banes vs. Banes, 8 Phila. 250. The allowance is all the more readily made, however, where the wife is the respondent and, as suggested in Powers' App., supra, at p. 328, forced into the litigation by her husband. Ordinarily on such applications the merits of the case will not be inquired into: Kline vs. Kline, 1 Phila. 383; Brooks vs. Brooks, 18 W. N. 115; Sutton vs. Sutton, 26 id. 398; Schireman vs. Schireman, 7 Pa. C. C. Rep. 110; Downing vs. Downing, 7 Kulp 138. The exception to the rule stated is in cases where there is conclusive proof of the wife's adultery or her commission of some such grave offence: Miller vs. Miller, 2 Kulp 309; Brenner vs. Brenner, 5 id. 6; Alexander vs. Alexander, 2 Lacka. Jur. 128; Pratz vs. Pratz, 11 Pa. C. C. Rep. 252, or of a state of facts which would preclude the possibility

of a decree of divorce in favor of the wife petitioning: Lloyd vs. Lloyd, 2 Woodw. 481. In all such cases alimony may be refused, though it seems that counsel fees are still to be allowed.

In the present case there have been depositions taken and submitted at the argument. A careful review of them discloses no positive guilt or serious wrongdoing on the part of the wife, and shows the husband to be possessed of property amounting to somewhere between \$6,000 and \$8,000, besides enjoying a considerable earning capacity. We are constrained to hold that the wife is entitled to both alimony pendente lite and counsel fees; and in order to do justice to her and fairly meet the necessities of her situation, the alimony ought to begin at the time this suit was brought, July 12, 1918. Under all the circumstances we think that an allowance of alimony pendente lite of \$40 a month and a counsel fee of \$150 will come as near as practicable at this time to doing justice between these parties, it being understood that if the amounts indicated are insufficient or if the alimony allowed should at any time or for any reason become excessive, application may be made to increase or diminish the alimony as the case may be, and that similarly there may be an additional allowance for counsel fees, if reasonably necessary.

And now, Dec. 21, 1918, the rule to show cause is made absolute to the extent of allowing to the wife \$40 per month alimony pendente lite (beginning July 12, 1918), and a counsel fee of \$150, with leave to the wife to ask for an additional allowance by way of alimony or counsel fees, or both, and also to the libellant to ask for a reduction of the alimony, accordingly as the one or the other may become proper in the progress of the litigation.

MARY A. KOCH vs. PHILADELPHIA AND READING RAILWAY CO.

Workmen's Compensation—Appeal—Finding of Fact—Interstate Commerce—Practice, C. P.

Where on an appeal from the Workmen's Compensation Board one of the defenses to the claim for payment under the Workmen's Compensation Act is that the decedent at the time he was killed was performing duties relating to Interstate Commerce and the Board in reaching its decision failed to make any finding of fact showing specifically what the decedent was doing at the time of his death, the cause will be referred back to the Board for the purpose of making such finding.

In the Court of Common Pleas of Berks County.

No. 67 March Term, 1918.

Appeal from Workmen's Compensation Board.

John B. Stevens for plaintiff.

Snyder, Zieber & Snyder for defendant.

The plaintiff claimed payment under the Workmen's Compensation Act from the defendant on account of the death of her husband, who was employed as a crossing watchman by the company.

One of the defenses in this case is that at the time of his death he was performing duties relating to Interstate Commerce, and that, therefore, the defendant company is not liable under the Workmen's Compensation Act.

In order to determine plaintiff's right, it is necessary to find as a fact not merely the general duties of the deceased as a crossing watchman, but what he was specifically doing at the time of his death. In the fifth finding of fact by the Board, we have this: "The uncontradicted statement of the claim petition as to the cause of the accident is as follows: 'Decedent was flagging a freight train going north. A shifting engine was sent south on another track for a short distance, then came back on the same track, caught and killed decedent.'" This is not a finding of fact of what defendant was doing at the time that he met his death. It is merely a finding of what is contained in the statement of the claim petition. Also in the sixth finding of fact we have a finding that the fact that the deceased was engaged in interstate commerce has not been proved, and that the Board has no evidence upon which it can base a finding that the deceased was so engaged. The finding whether or not the deceased was engaged in interstate commerce, without more, is a conclusion of law: *Flynn vs. New York, S. & W. R. Co.*, 101 Atl. 1034, 1035; *Graber vs. Duluth, S. S. & A. Ry. Co.*, 150 N. W. Rep., 489, 491; *Smith vs. Industrial Accident Commission*, 147 Pac. 600, 601.

In this case the specific service in which the cars were engaged that made up the train should be found, to enable the Court to determine whether the conclusion of law therefrom is justified. There is no finding by the Board whether any of the cars of, as is stated in the petition, this train that the deceased was flagging, were from without the state, or were going to points without the state. On pages 8 and 9, notes of testimony, we have the evidence and also the admission, and in that admission the fact established that a number of the cars constituting the train were bound from Port Reading, New Jersey, and Pennington, New Jersey, to Western Maryland. We have no finding of fact based on this evidence

and admission. If some of the cars were thus bound then, though they may have been empty, they were engaged in interstate commerce: *Nor. Car. R. R. Co. vs. Zachary*, 232 U. S. 248, 259.

The case is, therefore, not in a position for us to determine, until we have these additional findings of fact. We consequently refer the case back to the Workmen's Compensation Board for further findings and determination.

January 6, 1919.

By the Court.

DREIBELBIS & CO. vs. PHILADELPHIA & READING RAILWAY CO.

Affidavit of Defence, Common Carriers—Injury to Property in Transit—Act of God—Discretion as to Supplemental Affidavit.

1. Plaintiff's statement averred that the defendant, a common carrier, accepted for transportation a quantity of potatoes in good condition and upon a through bill of lading which negated the defendant's liability for injury caused "by the act of God." While in transit the potatoes were ruined by freezing. The defendant in its affidavit of defence, after broadly denying negligence and setting up some general allegations designed to account for the delay in transportation, contended that the freezing was an act of God, for which it was not liable either at common law or on bill of lading, without disclosing facts showing that it was free from blame. **Held:** that the affidavit was insufficient to prevent judgment.

2. Where an affidavit of defence is defective, the Court may at its discretion permit the filing of a supplemental affidavit.

In the Court of Common Pleas of Berks County.

No. 64 November Term, 1918.

Assumpsit. Rule for judgment for want of a sufficient affidavit of defence.

Harvey F. Heinly for Plaintiff and Rule.

Snyder, Zieber & Snyder, contra.

Opinion by Endlich, P. J., January 6, 1919.—The plaintiffs' statement declares that on Dec. 5, 1916, plaintiffs shipped on the defendant's railroad and defendant accepted for transportation from a point in this county to a point in Ohio a quantity of potatoes in good condition and worth upwards of \$1,100, in a car inspected by plaintiffs, and upon a through bill of lading which negated the defendant's liability for injury caused "by the act of God," and some other contingencies which need not be mentioned because not involved in this case—and complains that the defendant violated the contract of carriage in this that by reason of delay, carelessness and negligence in transit on the part of the defendant and of the connecting carriers the potatoes became frozen and were damaged, and so damaged reached their destination, where they were sold by the defendant company, and that the plaintiffs

thus sustained a loss of \$1,156.60, to be increased by interest on that sum from Dec. 18, 1916.

The affidavit of defence admits the good condition of the potatoes when received by defendant, their freezing, the refusal of the consignee to accept them, their sale by the railroad company for an amount which, after deduction of charges, left in its hands \$485.85, a tender of that amount to plaintiffs and its rejection by them, but denies the plaintiffs' allegation of delay, carelessness and negligence, averring that the car containing the potatoes was moved to its destination with all the care and dispatch that could be given to it under the circumstances, and that the lines of the connecting carrier were excessively congested at the time, making it impossible for the carrier company to move its freight with greater speed than that given to the plaintiffs' shipment.

It seemed to be conceded on both sides at the argument, and is probably beyond the possibility of dispute: see *Ry Co. vs. Harriman*, 227 U. S. 657; *Ry Co. vs. Rankin*, 241 id. 319, that this defendant's liability in carrying and delivering the potatoes was substantially the common law liability of a common carrier—i. e., in the absence of special contract limitations and in the absence of any want of care on the carrier's part, a liability for all losses except those proximately (*Morrison vs. Davis*, 20 Pa. 171) occasioned by the act of God or the public enemy, or by the inherent nature of the goods (*Warden vs. Greer*, 6 W. 424), or the default of the shipper (*Relf vs. Rapp*, 3 W. & S. 21; *Coxe vs. Heisley*, 19 Pa. 243; *Ry Co. vs. Hodapp*, 83 id. 22; *Express Co. vs. Shoop*, 85 id. 325; *Mfg Co. vs. Hilton*, 5 Pa. Super. Ct. 184). The good condition of the potatoes, their freezing and consequent depreciation in value, are, as already noted, not denied by the affidavit of defence, and there is no suggestion of default in the shipper, the plaintiffs. The negligence of the carrier is broadly denied, and there are some general allegations designed to account for the delay in transportation. But the precise circumstances under which the freezing occurred are not set forth. It is contended on behalf of the defendant that the freezing was an act of God for which the defendant is not liable either at common law or under the bill of lading in this case. It is, indeed, said in *Colsch vs. Ry Co. (Ia.)*, 34 L. R. A. (N. S.) 1013, that:

It is generally held that where goods of a perishable nature are injured . . . by a sudden and unexpected freeze . . . the carrier is not liable, in the absence of a showing of negligence on its part. If the transportation is being carried on at a season of the year and in a locality when a freezing spell is, in the nature of things, probable, the carrier will be held liable . . . only when common prudence would have required it to anticipate such weather conditions as were probable, and to provide against them by sheltering the goods.

In other words, the occurrence is treated as an "act of God" as that phase is explained in *Hays vs. Kennedy*, 41 Pa. 378 (see pp. 382-5), the doctrine of which case, qualifying the carrier's exemption from liability for even such an occurrence if there was negligence on the carrier's part proximately causing the injury, seems to agree with that laid down in *Colsch vs. Ry Co.*, supra. According to each of these cases, the carrier, to be relieved from liability by an "act of God," must himself be free from blame. Of course, however, the burden of proving any valid excuse from liability is upon the carrier: *Hays vs. Kennedy*, supra, pp. 383, 384; and in order to make such a defence effective in an affidavit of defence, it must be set forth therein according to the rules recognized as applicable to such instruments. If, as would appear from the argument made in behalf of the defendant, it is intended to be alleged that the occurrence of a freezing spell was unforeseen and unforeseeable, that the congestion of the railway lines was due to no default of the carrier companies, and that for these reasons they were unable to anticipate the probable injury to the shipment and to protect the latter against such injury, it was imperative to allege these matters in detail in order to complement and bear out the general denial of negligence, etc., which without specification of the very facts whereon that denial is to be predicated can amount to nothing more, and is in reality nothing more, than the affiant's own conclusion upon the undisclosed facts known to him and by him judged to overcome the plaintiffs' demand, and as such is insufficient upon principles too often declared and too well understood to call for the citation of the decisions. The learned counsel for the defendant at the argument of this rule seem to have felt the weakness of the affidavit of defence in the particular just pointed out; for they have asked that in the event of the Court's regarding as insufficient the averment in the affidavit of the facts relied on, there may be an opportunity afforded for filing a supplemental affidavit of defence—a request which is addressed to the discretion of the Court: *Fleisher vs. Blackburn*, 15 Pa. Super. Ct. 289, and which we think ought to be granted.

It is hardly needful to add that what has been said is not to be understood as intimating that the matters advanced by defendant's counsel in their argument are enough to prevent the summary judgment asked by plaintiffs. What is meant to be decided now, and all that is meant to be decided, is that, in so far as those matters are to be considered in disposing of this rule, they must appear by the affidavit of defence.

And now, Jan. 6, 1919, leave is given to the defendant to file a supplemental affidavit of defence in the above-entitled case within 15 days from this date.

HARTGEN vs. HARTGEN, Administrator, et al.**Decedents' Estates—Jurisdiction—Equity—Property Outside the Estate.**

1. The Court of Common Pleas, either by action at law or in equity, and not the Orphans' Court, has jurisdiction where an heir at law attempts to recover for the estate a sum of money clearly outside of the estate.

2. Where an administrator refuses to bring an action to recover property alleged to belong to the estate, an heir at law is a proper party to bring suit in equity.

In the Court of Common Pleas of Berks County in Equity.

No 1217 Equity Docket, 1917.

Bill and Answer.

Harvey F. Heinly for Plaintiff.

Harry J. Dumn and John B. Stevens for Defendant.

Opinion by Wagner, J., January 13, 1919.—Plaintiff in his bill in equity avers that he is a brother and an heir at law of John Hartgen, deceased, and as such entitled to inherit part of his estate. That letters of administration upon the estate of the said John Hartgen, deceased, were granted to Jacob Hartgen, another brother. That John Hartgen was in his lifetime possessed of a deposit in the Savings Department of the Pennsylvania Trust Company to the amount of \$9,088.53. That while he was seriously ill and mentally unable to comprehend the nature of his act, and physically and mentally unable to resist the importunities, persuasions, and undue influence of Edward A. Hartgen and George P. Hartgen, two of the defendants in this suit, he signed a withdrawal slip of his deposit in their joint favor, without receiving any consideration therefor. That by reason of the aforesaid premises no title to the said funds ever passed out of the said John Hartgen, and that the said funds are the property of John Hartgen, deceased. That Jacob Hartgen, administrator of John Hartgen, has knowledge of the facts in connection with the transfer of the funds out of the name of the deceased into the names of Edward A. Hartgen and George P. Hartgen, and the circumstances of such transfer, and that therefore he knows that the funds belong to the estate of the decedent. That with this knowledge, Jacob Hartgen, as administrator, filed an inventory of the estate in which he failed to charge himself with the above named sum as principal of the estate of John Hartgen, deceased, and has refused to take any steps as administrator to recover the said money by proceedings at law, so that it may become a part of the estate of John Hartgen, deceased, although demand was made upon him by the plaintiff so to do. In his prayer he asks that the said money be decreed to be the property of the estate of John Hartgen, deceased, and that an order be made direct-

ing Edward A. Hartgen and George P. Hartgen to transfer the funds into the hands of Jacob Hartgen, administrator of John Hartgen, deceased; and, further, that pending the determination of this case, the defendants be restrained from charging, transferring, paying out, or in any manner disposing of said funds except by transferring the same to Jacob Hartgen, administrator of John Hartgen.

The defendants have filed an answer, and therein, in the nature of a demurrer, have raised two questions. The first is that this Court does not have jurisdiction to determine in whom the title of the money in dispute lies, but that the jurisdiction rests in the Orphans' Court; and, second, that the bill must be dismissed because Peter J. Hartgen, even though an heir at law and party in interest, has no standing as plaintiff—that is, that the action must be brought by the personal representative.

It will be noted from the averments in the bill, that at the time of the death of John Hartgen, the money in dispute had been transferred by him to his two brothers as trustees to be, by them, in that capacity, distributed. It is only as it is shown that the decedent at the time of making the transfer was mentally incapacitated to do so, that this money will become part of his estate. Neither, according to the averment in the bill, has the administrator made it a part thereof by including it in his inventory. We have, therefore, a sum of money clearly outside of the estate, in the possession of third parties, attempted to be recovered for the estate. Under these facts the Orphans' Court does not have jurisdiction thereof, as contended for by defendants' counsel, but the same lies in the Common Pleas either by action at law or in equity.

The facts of this case are very similar to those in *Cutler's Estate*, 225 Pa. 167, wherein Mr. Justice Stewart says (p. 170): "Stated conversely, the jurisdiction of the Orphans' Court is limited to the estate of which the testator died seized. With respect to such estate it has full jurisdiction; but this marks its ultimate limit. Whether a specific article of property belongs to the estate, is a question standing in limine; if it does not, the executor is not accountable therefor, and it is beyond the power of the court to control it in any way or charge liability on anyone in connection therewith. . . . (p. 171). Suppose the property to be in possession of a third party who claims to have purchased it from the testator. Such person is not under the jurisdiction of the Orphans' Court, and that court has no process by which his appearance before it can be compelled. Neither is the property under its jurisdiction, and it is without process to enforce its surrender. . . . (p. 173). When it is said that the Orphans' Court has jurisdiction to decide all questions standing in the way of distribution, the

reference is to property which admittedly is the property of the estate, or has been so established." See Paxson's Estate, 225 Pa. 204; Williams' Estate, 236 Pa. 259, 269. It is clear from these authorities that the Orphans' Court in this case has neither jurisdiction over the subject, namely, the money in dispute, nor the persons, that is, the ones now having possession of said money, and that therefore the jurisdiction lies not in the Orphans' Court, but in the Common Pleas either in an action at law or in equity.

This brings us to the next question: Is the plaintiff a proper party to bring this suit in equity? Defendants contend that he is not, and that under *Gilkeson vs. Thompson*, 210 Pa. 355, the bill must be dismissed. An examination of the fourth ground of demurrer in that case, on page 360, shows that the reason the plaintiff as next of kin and heir at law of the deceased had no standing, was because the decedent died testate, and the paper purporting to be his last will had been admitted to probate more than a year before the bill was filed, and that if the will stood, and it was not to be assumed it would be set aside, the plaintiff had no interest to be protected. That is, there was nothing to show that there was a present existing interest in plaintiff as an heir of the decedent. Or, as is stated on page 360: "The case of the appellant as presented by him is that of one admittedly having no standing at the time he makes his complaint; but because he hopes for the successful ending of the contest to have the will of his kinsman set aside—in its very nature most uncertain—he asks to be heard." In the present action we have a specific averment of a present existing interest as an heir at law of decedent, which interest defendants admit in their answer. This case is consequently not governed by *Gilkeson vs. Thompson*.

The bill avers that the plaintiff has requested the administrator to bring an action for the recovery of this money, and that he has refused. In *Bem et al. vs. Shoemaker et al.*, 74 N. W. 239, the Court says (p. 240): "The administrator may have honestly believed that Emilie Bem was the owner of all the property in her name, claimed by the plaintiffs to belong to the estate, and in good faith refused to expend the assets of the estate in what he believed would be a fruitless effort to recover it for the estate. In such case the county judge may not have deemed it proper to remove or suspend him as administrator. But would the heirs then be without remedy? That they would seems to be the opinion of counsel. If they would have no remedy, there must be a serious defect in the law. Courts of equity are always open to heirs, creditors of an estate, and stockholders in a corporation, to give them redress whenever those whose duty it is to protect the trust property refuse to perform their duty. As early as 1814 the learned Chancellor

Kent, when stating the general rule, also adds that there are exceptions to the rule; such as the insolvency of the executor, collusion between the executor and debtor of the estate, or where there is some other special case not exactly defined. *Long vs. Majestre*, 1 Johns, Ch. 305; *Hagan vs. Walker*, 14 How. 29; *Van Dyke vs. Van Dyke*, 31 N. J. Eq. 176; *Bate vs. Graham*, 11 N. Y. 237. In the latter case one of the headnotes reads as follows: 'But if the executor or administrator collude with the fraudulent vendee, or, after reasonable request, refuse to take proceedings to impeach his title, and reach the property in his hands, a creditor may maintain an action against him and the executor or administrator for that purpose.' It is true, these were all cases in which creditors of the estate brought the action; but in the recent case of *Randel vs. Dyett*, 38 Hun, 347, the same principle was applied to heirs, and an action instituted by one of the heirs of the estate was sustained. In that case the court says: 'The person, however, who represents the estate, will not defend it. He will not bring an action to set aside the transfer made by himself under these circumstances. To meet this state of facts it is an acknowledged principle in our law that when a person whose duty it is to act refuses, a party injured by the refusal may act in behalf of the injured estate. . . . An heir at law is surely injured by a fraudulent transfer. . . . The heir has the right to have his father's property applied as directed by statute.' It will be noticed that the decision proceeds upon the theory that the estate should be protected, and, as the administrator refused to institute the action, the heir could bring it in his own name. In none of the cases is the remedy proposed by the learned counsel for appellants, namely, application to the Probate Court for a removal of the administrator, and the appointment of another in his place, suggested or referred to by the court, but the decisions are placed upon the broad ground that, when a party whose duty it is to protect the interests of the estate refuses so to do the party beneficially interested may take the necessary proceedings to so protect it. It will thus be seen that the court, in holding that the heirs of the estate, after the refusal of the administrator to act, could maintain the action, announced no new doctrine, and established no new theory, but simply followed in the line of the adjudicated cases." In *Story's Equity Pleadings*, Ninth Edition, Sec. 178, we have: "If there are persons, who have possessed themselves of the estate of the deceased, or are his debtors, and there is collusion between them and the personal representatives, or the latter are insolvent, a creditor or a legatee, or a distributee, may make such third persons parties to a bill against such personal representatives. (a) So, if the executor or administrator refuse to collect an outstanding debt or fund

belonging to the assets; the case falls within the like predicament." In 14 Cyc. 144, the principle is stated: "It is also well settled that heirs or distributees may sue in equity to recover personal assets of the estate, where such a suit is necessary for their protection because of fraud, collusion, insolvency, or neglect or refusal to sue, on the part of the administrator, or other special circumstances." See also cases cited in support of this principle under note 78. In *Hadley vs. Hadley et al.*, 144 Pac. 80, we have (page 82): "Where the personal representative neglects or refuses to act, which was the case here, the heir may apply in equity to reduce to the possession of the administrator the outstanding assets of the partnership, so that it may be included in the estate, and this suit can only operate in aid of the administration."

The purpose of this suit is that the Court "make an order, directing the said Edward A. Hartgen and George P. Hartgen to transfer the said funds into the hands of Jacob Hartgen, administrator of John Hartgen, deceased"—that is, it is a suit in aid of the administration. Under special circumstances, it has been held in Pennsylvania that suit can be brought by others than the personal administrator: *McLean's Executors vs. Wade*, 53 Pa. 146, 150; *Roberts vs. Messinger*, 134 Pa. 298; *Lee vs. Gibbons*, 14 S. & R. 105. We consider that under the averments of this bill neither of the positions contended for by the defendants, namely, that the court has no jurisdiction over the subject matter and that the suit must fail for want of proper parties, can be sustained. Defendants' prayer to have the bill dismissed, upon these grounds raised in their answer in nature of a demurrer, is denied.

REINHEIMER'S ESTATE.

Wills—Construction of Will and Codicil—Codicil Defined—Residuary Clause Reaffirmed by Codicil.

1. Where a will and codicil are to be construed together, they must be regarded as parts of one and the same instrument, and the codicil is not to be allowed to vary or modify the will, unless such was the plain and manifest intention of the testator.

2. The codicil to a will, unless it expressly revokes the will, is but an amendment to it, and, not being inconsistent with it, does not revoke it.

3. Wherever possible a codicil will be so construed as to give effect to all the provisions of the will.

4. A testator, after making a number of bequests and directions, devised and bequeathed the residue of his estate "to the party or parties who may be farming my farm and taking care of me at the time of my death." The codicil to the will provided, "if Samuel Good now farming my farm and taking care of me remain and be with me up to and at the time of my death, that he, the said Samuel Good, shall become entitled, under my foregoing will, to the

rest, residue and remainder of my estate, as therein expressed." Held: that the codicil did not change or revoke the residuary clause, but re-affirmed it.

5. The words "farming my farm and taking care of me at my death," as used in such residuary clause imposed upon the taker the duty of having tilled the land with a reasonable degree of efficiency and of having given reasonably thoughtful attention to the testator during his illness.

Wills—Designation of Devisee—Certainty.

6. It is not essential to the validity of a gift, either of real or personal estate, that the person who is the intended object of the testator's bounty should be actually pointed out on the face of the will. It is enough that the testator has provided the means of ascertaining it according to the maxim, *id certum est quod certum potest*.

7. An unnominated person in order to take under a will must answer the whole of the description or the designation by which he is mentioned in the instrument.

In the Orphans' Court of Berks County.

Account of the Colonial Trust Company and W. B. Bechtel, executors.

W. B. Bechtel for the accountants.

Stevens and Eves for Harry A. Lord, residuary legatee.

Jefferson Snyder and C. H. Ruhl for the heirs at law.

Opinion by Schaeffer, P. J., January 18, 1919.—William K. Reinheimer, died on or about February 2, 1918, testate, and left to survive him his widow and two sons. In his will dated November 9, 1915, the decedent, after making a number of bequests and directions, disposed of the residue of his estate as follows:

"Item: As to the rest, residue and remainder of my estate, real, personal and mixed, I give, devise and bequeath the same to the party or parties, their heirs and assigns forever, who may be farming my farm and taking care of me at the time of my death."

In a codicil to his will dated January 20, 1916, the decedent, after revoking a number of the bequests made in the will, provided, as follows:

"Item: It is further my wish and will that if Samuel Good now farming my farm and taking care of me remain and be with me up to and at the time of my death, that he, the said Samuel Good, shall become entitled, under my foregoing will, to the rest, residue and remainder of my estate, as therein expressed."

At the time of decedent's death Samuel Good did not occupy the farm of the decedent nor take care of him, his place having been taken by one, Harry Lord, who lived there and now claims to have farmed the farm and cared for decedent. Lord moved on the farm in April, 1916, under a lease with the decedent, which was for the term of two years

and stipulated that Lord was to have half of the crops and furnish the decedent with a room, board and "waiting."

Several years before his death, the wife and sons of the decedent, on account of his drinking habits, were forced to withdraw from the home and farm, and consequently during the latter years of testator's lifetime the farm was occupied by strangers and himself. The balance for distribution in this account is \$10,308.72; and the question presented for determination is whether the heirs-at-law of the decedent, the two sons—it being conceded that the widow is entitled to her dower rights—or whether Harry Lord, who occupied the farm with the decedent is now entitled to this fund? To satisfactorily answer this question it will be necessary to consider two other questions, upon the solution of which depends the answer to the first question.

First—Does the codicil change and revoke, or reaffirm, the residuary clause in the will?

Second—Does Harry Lord measure up to the description in testator's will, as the person entitled to the residue of the estate?

The heirs contend that the codicil which named Samuel Good as the beneficiary, changed and revoked the residuary clause of the will wherein the estate is given to the party, "who may be farming my farm and taking care of me at the time of my death."

It is contended that the residuary clause in the will is **very** indefinite, and that the devise to the "party or parties, their heirs and assigns forever," may **mean** one or many, thus showing that the testator had **not** definitely determined in his mind to whom his **estate** should go and no doubt contemplated **holding** in abeyance and under consideration until a later time when he could fix his mind upon some person to whom he desired to give the residue of his estate; that it was not until two months after making the will that his mind became fixed upon such a person and he then executed the codicil to his will wherein he named Samuel Good as the person who should have his estate if he remained on the farm with him up to the time of his death. It is admitted that Samuel Good did not remain with him, and on that account cannot take under the codicil. But the heirs go further, and argue that the name of Good in the codicil made a specific change in the residuary clause in the will, in that it designated a particular person as the object of the testator's bounty, and that, consequently, Good not having been farming at the time of decedent's death, the residue passed under the intestate laws because the codicil changed and revoked the residuary clause in the will.

In such a case as this, where a will and codicil are to be construed together, the rule is well settled that they must be regarded as parts of one and the same instrument, and that the codicil is not to be allowed to vary or modify the will, unless such was the plain and manifest intention of the testator: *Sigel's Estate*, No. 1, 213 Pa. 14-16; *Thomas Estate*, 241 Pa. 290; *Wears' Estate*, 26 Dist. R. 30. In *Spang vs. Hill*, 2 Woodward, 45, after a consideration of the authorities, the Court said: "The general result of the authorities on the subject is, that notwithstanding a codicil the provisions of the will are to stand, unless in order to effect the purposes of the codicil, it is absolutely necessary that the provisions of the will shall give way."

The codicil to a will, unless it expressly revokes the will, is but an amendment or addition to it and not being inconsistent with it does not revoke it: *Sharp's Estate*, 155 Pa. 289-294.

"Where it is possible to construe the codicil so as to give effect to all the provisions of the will, it certainly should be done." *Cassidy's Estate*, 224 Pa. 199; *Wright's Estate*, 68 Pa. Superior Ct. 177-200.

We cannot agree with the view that the codicil is inconsistent with and revokes the residuary clause of the will. The two provisions can be construed together and the proper legal effect given to each of them without violating the intention of the testator. If Samuel Good had tilled the farm and taken care of the decedent at the time of his death, as provided in the codicil, he would undoubtedly have been entitled to the residue of this estate. But even if there had been no codicil to this will and Good had lived on the farm and farmed it at the time of decedent's death, he would have been the beneficiary under the residuary clause, which gives the estate to the "party or parties" farming at the time of his death. The fact that Good was particularly designated by name in the codicil as the party who should take, does not necessarily mean that no one else was to take in case Good did not live there, and that the residuary clause was intended to be revoked. Instead of revoking the residuary clause in the will, the testator practically reaffirms it in the codicil by declaring that Good "shall become entitled under my foregoing will to the rest . . . of my estate, as therein expressed."

While it is true that under the construction which we place on this codicil, it may be said, that it was needless for the testator to add the same, and that it might be regarded as useless and idle if the provisions in the will giving the residue to "any party or parties" is to stand, yet this amendment of Good's name can be explained by Good's living with testator at the time it was made and by the probability that his work

so pleased testator that he concluded to specify him as the party who should take if he lived with him at his death. The codicil restricts the devise of the residue to Good conditionally, limiting him to the condition that he must be working farm at the death of the decedent, and indicates or implies in no way a purpose to exclude any other person who might be living with him at the time of his death, in case Good did not.

The testator does not name any particular person in the residuary clause of the will, but used the words "party or parties," as the object of his bounty. It is contended that this designation of the persons to take is too vague, indefinite and uncertain, and consequently this provision in the will falls.

"It is not essential to the validity of a gift, either of real or personal estate, that the person who is the intended object of the testator's bounty, should be actually pointed out on the face of the will. It is enough that the testator has provided the means of ascertaining it, according to the maxim, *id certum est quod certum potest*. . . . Hence, it was decided in *Stubbs vs. Bargaen*, 2 M. Y. & C. R. 507, 44 Revised Reports, 242, at page 250, that a devise in favor of persons who might be partners of the testatrix or to whom she might sell her business was valid; Lord Langdale observing that if the description be such as to distinguish the devisee from every other person, it is sufficient." Jarman, Vol. 1, page 743.

In *Butterweck's Estate*, President Judge Schwartz, in District Reports, Vol. 4, page 563, at page 565, says: "We agree with the Auditor that Jacob Keeley, Sr., is the legatee designated under the provisions of the will, by the words, 'that person or family in whose house and under whose care I am in my last sickness.' The testatrix was in his house at the time of her last sickness and he cared for her during said sickness. The evident purpose of this bequest was to secure shelter, care and nursing in her last days. She obtained these comforts under the roof of Mr. Keeley and under his care."

Therefore, any person, who can be properly identified and distinguished from other person as the person, "who may be farming my farm and taking care of me at the time of my death," is entitled to the residue of this estate, since Good did not live with the decedent at the time of his death.

Harry Lord lived on the farm with the decedent at the time of his death and claims that he is the person who measures up to the requirements of the residuary legatee.

Counsel for Lord take the position, apparently, that his mere occupancy as tenant of the farm of testator at the latter's death now entitles him to take this estate. In other words, if their contention were sound, the matter would simply

resolve itself into a bare question of identity; and Lord, on the farm at testator's death, would be entitled to this estate regardless of the manner in which he performed any duty he may have owed decedent. To fortify this position, however, they submitted testimony of a character tending to establish the degree with which Lord sought to carry out his obligations to testator.

We may say at once that we cannot concur in the position thus taken. Lord's mere tenancy of the farm at testator's death, irrespective of his conduct in living up to his obligations to testator, in our opinion, does not establish his right to this estate. To take under the will, he was required to do something more than just live on the place. "Farming my farm and taking care of me at the time of my death," were additional conditions imposed upon him; and in considering this phase of the question, the words expressing the conditions must be regarded as having been used in their usual and ordinary sense. "Farming my farm and taking care of me" imposed upon Lord certain duties and obligations, and, under a fair interpretation of these terms, meant a reasonable degree, first, of efficiency in tilling the land, and second, of thoughtful attention to testator's wants in his illness. This reasonable degree of efficiency and attention to testator's wants, therefore, was no less a condition to Lord's taking this estate than his occupancy of the farm at testator's death; and unless he has complied with both conditions thus imposed upon him by the will, Lord, in the Court's opinion, has failed to establish a right to this estate. "It is a general rule . . . that if an unnominated person takes, he must answer the whole of the description or the designation by which he is mentioned in the instrument:" *Irwin vs. Dunwoody*, 17 S. & R. 81.

The next question, therefore, we take to be: Is the evidence of Lord's faithful performance of his duties and obligations to decedent so conclusive and free from doubt as to warrant us in saying he has met all the requirements in the will and as against the heirs, in whose favor all doubts should be resolved, is entitled to this estate?

From the evidence, we find the following facts:

FINDINGS OF FACT.

1. William K. Reinheimer, the decedent, died testate, on or about February 2, 1918, and was 63 years of age at the time of his death.

2. The decedent provided in his will dated November 9, 1915, as follows:

"Item: As to the rest, residue and remainder of my estate, real, personal and mixed, I give, devise and bequeath the same to the party or parties, their heirs and assigns for-

ever, who may be farming my farm and taking care of me at the time of my death."

In a codicil executed on January 20, 1916, to said will, he further provided:

"Item: It is further my wish and will that if Samuel Good, now farming my farm and taking care of me, remain and be with me up to and at the time of my death that he, the said Samuel Good, shall become entitled under my foregoing will to the rest, residue and remainder of my estate as therein expressed."

3. That, at the time of decedent's death he was living on the farm, containing about sixty acres, situate in Alsace Township, Berks County, with the tenant Harry Lord and his family, who had moved on the farm in April, 1916, under a lease with the decedent.

4. That Samuel Good, the party named in the codicil, moved away from decedent's said farm in April, 1916, and was not farming it or taking care of him at the time of his death.

5. That Harry Lord did not cultivate the farm of the decedent in a fair, reasonable or husbandlike manner, but neglected his duties in this respect as no prudent and diligent man would have done in the circumstances.

6. That Harry Lord did not as he was able to do, give such care and attention to the decedent as the latter's illness required or the circumstances demanded; but neglected his duty in this respect, failing to furnish testator with such ordinary comforts and nursing as were well within the means of Lord and his family.

7. That Harry Lord did not farm the farm of the decedent and take care of him at the time of his death as required by the will, and therefore does not answer the description of the person entitled to take the residue, viz: "the party or parties who may be farming my farm and taking care of me at the time of my death."

The testimony shows that for many years decedent had been a hard drinker and that his later years were filled with trouble and suffering. Both sides admit and, in fact, we personally know that testator had been drinking excessively and that latterly his home had been broken up, his estate was being wasted, and his health was failing. At his death he was the owner of a farm situate in Alsace Township, this county, on which he and his widow and his two sons had lived together and worked hard until by his incorrigible habits and conduct the widow and sons were forced to leave the place.

The testimony shows, and it is well known, that widow and sons, very reputable people, by their faithfulness and industry, helped the decedent to earn and accumulate the estate

he possessed. After he became estranged from them and took to dealing with strangers his trials and difficulties began.

He then rented his farm on shares, the last two tenants having been Samuel Good and Harry Lord. Good left the farm in April, 1918, and his place was taken by Harry Lord, the claimant here. Besides a share of the crops, decedent, in the lease to Lord, reserved for himself a room in the house, board and necessary "waiting." Save the lease it does not appear that Lord had any other contract with the decedent. Lord knew nothing about the provision in the will giving the residue to the "party" who lived on the farm at testator's death; nor did he, consequently, go there because of any knowledge of decedent's purpose to devise his residuary estate to the party who farmed for him.

It is submitted that the manner in which Lord performed his duties and obligations was a question for the decedent and is not for the Court. With testator lay the remedy, if he was dissatisfied with Lord's conduct of affairs, and if he took no steps to remove Lord, he must be assumed to have been satisfied with Lord's methods, and we have no right to consider the manner in which Lord tilled the soil and cared for testator. This might be so, were the evidence conclusive of Reinheimer's satisfaction with Lord's work. But it is not. Not only is it contradictory, inclining rather to the view that Reinheimer was dissatisfied with Lord's conduct and methods, but it points to a state, where, weakened by alcoholic excesses, testator was no longer master of himself or the situation, which went from bad to worse. Henry Trivetts, Hiram Schaeffer and William Schildt all testified to this effect. Reinheimer had complained to them of Lord's mismanagement and wastefulness on the farm. Their truthfulness is supported by testimony of a number of witnesses, who have known the farm and the decedent for twenty or thirty years. All say the farm was scandalously managed and the decedent shamefully neglected and imposed upon. To say, therefore, that decedent, if he was dissatisfied with Lord, could have ejected him, is without force here, for during the last years of his life decedent was so weakened by illness and habits of dissipation as to be unable to assert himself.

Considerable testimony was taken on both sides to show how the farming was done and what care was taken of the decedent. Mr. Lord testified, on page 6, that he took good care of the decedent, that he and his family made him as comfortable as possible; that the decedent was helpless as a child during the last three weeks of his lifetime, that he had lost control of his bowels, and that for weeks and months he required great care and attention, which were furnished by witness and his family. Witness also testified that he did

the farming in a proper manner, raised as much grain and hay as he could in connection with the operation of a cider press four days a week in the fall of the year. Mrs. Kingsbury, on page 22, said, that decedent told her he would never forget Lord and that he was to have everything it was possible to give him; and that Mr. and Mrs. Lord "tended him all the time." Martin Blank testified, on page 11, "he was treated all right, he said he wouldn't know how to get along if Harry would leave." Mrs. Lord, James Allen, Jacob Frick and W. B. Bechtel, all testified that the decedent expressed his appreciation of the kind and faithful services rendered to him by Harry Lord, his wife and his daughter.

Against this testimony, we have that of William Schildt, Rosie Kantner, Jacob D. Kantner, Henry Steele, Harry Trivetts, Harry Kasulka, Edwin Schweitzer, Frank Moyer, Dr. Francis Sunandy and others, who say not only that decedent was neglected and actually ill-treated, but that no farming of any account was done. William Schildt, Rosie Kantner, Dr. Sunandy, all testified that they saw the decedent during his last illness in a small room occupied with him by Mr. and Mrs. Lord and their daughter, as a bed room. That his bed, bedding and surroundings were anything but clean and inviting, and that all appearances indicated that he was sadly neglected and received very little care and attention. Witnesses described how he lay in his excrement as shown by the crust on his trousers; how while confined to bed Lord forced him to drink from a bottle which Lord said contained medicine, but which decedent complained was so bitter and smarted his throat. Dr. Sunandy testified it was liquor, and protested against giving it to testator in his last illness, but Lord disregarded these instructions. The testimony shows further that Lord bought great quantities of liquor for decedent, and that he repeatedly said he was feeding the old man (the decedent) up with gin. Sadie Good, page 56, Katie Eckert, page 57, testified that they met Mrs. Lord on their way to church one day, and asked her about grandpa, the decedent. Mrs. Lord, replied: "Always drunk, Harry is buying gin by the gallon and if that don't fix him, we will buy a barrel." Mr. Schildt, Mr. Kantner, Mr. Steele, Mrs. Trivetts, Mr. Schweitzer, testified as to the character of Lord's farming. They said that the farm was neglected and not worked, that it was literally covered with weeds, that very little seeding was done, that crops ready to be harvested were left in the field to rot and waste, and that the place was going to ruin largely because Lord did very little farming, but spent most of his time away from home in his automobile. To corroborate these latter witnesses is the item in the account, showing decedent's share of the income of his sixty acre farm

for 1917, was only \$165.47. No income for 1918, has thus far been accounted for by Lord.

The purpose of the testator in making this residuary bequest was two-fold: to assure, first, for himself the care and attention to which an old man of his circumstances was entitled; and, second, for his farm the continued careful cultivation that he and his family had formerly given it, the fruits of which made him a fairly rich man among his neighbors. Under this testimony we cannot say that Lord either cultivated the farm or cared for the decedent as required by the will. In arriving at this conclusion we have taken into consideration the character of the witnesses produced. Any impartial observer of their appearance and manner on the stand would have been impressed with the contrast between those testifying for the heirs and those brought to sustain Mr. Lord's claim. We were not favorably impressed with Mr. Lord, Mr. Blank, Mr. Zest, Mrs. Frick, Mrs. Kingsbury and Mrs. Arnold, who were either relatives of claimant or persons of migratory character with little knowledge of decedent. On the other hand, Mr. Schildt, Mr. Steele, Mr. Schweitzer, Mr. Trivetts, Mr. Ahrens and others, are all well known, residing in the neighborhood of the farm for many years, who have known decedent and his family for many years, and are reliable and trustworthy in every respect.

Therefore, after carefully considering all the evidence in the case, in connection with the credibility of the witnesses, we conclude that Lord has not qualified to take under the residuary clause of the will, and that with respect to this residue testator having died intestate, it now passes to the two surviving sons. Distribution will be made accordingly.

KLEMMER'S ESTATE.

Decedents' Estates—Wills—Devises of Real Estate cum onere—Residue Defined—Construction—Intention of Testator.

1. Specific devisees of real estate encumbered by mortgage cannot ask special pecuniary legatees to contribute out of their legacies to the payment of the encumbrance on the devised real estate.

2. The residue of a man's estate, in testamentary language, means whatever is not specifically devised or bequeathed, and in whatever part of a will it may happen to be found it ought to have that meaning, unless the whole will taken together shows clearly that it was not so intended.

3. In construing a will, the Court seeking for the testator's intention should take into consideration his surrounding circumstances—his family, and the amount and character of his property.

In the Orphans' Court of Berks County.

No. 55 June Term, 1918.

Exceptions to adjudication and distribution.

W. K. Stevens, Esq., for the exceptant.

W. K. Stevens and Rothermel and Mauger for the account-
ant.

Opinion by Schaeffer, P. J., January 18, 1919.—The first three exceptions relate to the disallowance of the claim of Rose Klemmer, a daughter, for \$152.93, for money alleged to have been advanced by her to decedent for household expenses. Further consideration of this claim, in the light of the evidence presented to support it, has failed to convince the Court that error has been committed in its disallowance; and the exceptions relating to it accordingly are not sustained.

The fourth paragraph of the exceptions relates to the devise of properties 948 Buttonwood street, Reading, which are encumbered by a mortgage of \$1,500, to Rose and Joseph A. Klemmer; and really is not an exception, but a prayer for permission, on the part of exceptant, to present the bond for payment, and a request that the Court decide whether or not the devisees take the property cum onere. Permission to present the bond for payment was granted to exceptant; and on October 10, 1918, Mr. Eves, representing Maria Josephine Auer, executrix of the deceased mortgagee, presented the bond, secured by mortgage on 948 Buttonwood street, recorded in Mortgage Book, No. 241, page 272, for \$2,000, on which a balance of \$1,500 is claimed to be due. At a hearing subsequently set down on the exceptions, both sides appeared and offered testimony in relation to said mortgage; and while Maria Josephine Auer, executrix of the deceased mortgagee, afterward decided to withdraw her bond for payment out of this fund and to look to the encumbered premises for payment, since the question of who shall pay is between the legatees exclusively, all of whom have joined in submitting it for decision, the Court has no doubt of its jurisdiction of the matter. Certain it is, that devisees whose property is encumbered are here contending that the mortgage is payable out of this fund; and the question thus raised by them they are entitled to have decided.

The substance of testator's will, out of which the controversy arises, is as follows:

Providing first for the payment of his just debts and funeral expenses, he gives to his children and a grandchild several specific legacies of household effects, and follows with the item, "I give, devise and bequeath unto my daughter, Rose Klemmer, and my son, Joseph A. Klemmer, in equal shares, all that certain two-story brick store stand and dwelling house, being No. 948 Buttonwood street, together with the

two-story brick dwelling house, No. 344 North Tenth street, and lot or piece of ground upon which the same are erected, situated at the southwest corner of Tenth and Buttonwood streets, in the City of Reading, . . . with the appurtenances, to have and to hold the said buildings and lot of ground above described to them, their heirs and assigns forever."

By the next item, he directs "all the rest, residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever," to be converted into money; "And when the whole of my residuary estate shall be converted into money as aforesaid, then I will and direct the same to be disposed of as follows:."

To Rector of St. Paul's Roman Catholic Church, Reading, for masses.....	\$ 100.00
To Sarah M. Lanshe, a daughter.....	2,000.00
To his executors, in trust for his daughter, Martha Klemmer, with remainder to his daughter, Sarah M. Lanshe	2,000.00
To Ida Klemmer, a daughter.....	200 00
To each of four grandchildren.....	100 00
To each of four grandchildren.....	5.00

And "All the rest, residue and remainder of my estate, I give and bequeath unto my daughter, Rose Klemmer, my son, Joseph A. Klemmer, and my daughter, Sarah M. Lanshe, in equal shares."

From this it will be observed that the will contains two residuary clauses, and upon this fact apparently turns the answer to the question presented in the exceptions. Were it not for the first of these clauses, both sides to the controversy agree the devisees of the real estate in question, in the present state of the case, would take it cum onere. For as between specific devisees of real estate and special pecuniary legatees, it seems to be conceded, no such question, under the authorities, can arise; and the fund here for distribution not being sufficient to satisfy the pecuniary legatees in full, there will be, after their payment, nothing for the residuary legatees named in the last residuary clause. This position follows the cases holding that specific devisees of real estate encumbered by mortgage cannot ask special pecuniary legatees to contribute out of their legacies to the payment of the encumbrance on the devised real estate: *Ruston vs. Ruston*, 2 Yeates, 54; 2 Dallas, 242.

But under another line of cases which hold to the general principle that personal estate is first applicable to the payment of debts, including even encumbrances on real estate, and that a devisee may call upon the executor to exonerate the land by application of residue to the discharge of a mortgage, it is contended by the devisees here that the first

residuary clause of this will controls; and that all the pecuniary legatees embraced therein, being no more than residuary legatees, must contribute to the payment of the mortgage on the devised real estate. The question is, therefore, what is residue of this estate which, under the law, should be applied to the payment of this mortgage?

"The residue," of a man's estate, in testamentary language, means whatever is not specifically devised or bequeathed, and in whatever part of a will it may happen to be found it ought to have that meaning, unless the whole will taken together shows clearly that it was not so intended," said the Court in Willard's Appeal, 68 Pa., 327. Of course, as stated in Hocker's Appeal, 4 Pa., 497, "The intention of the testator is the pole-star by which courts must be governed in construing wills;" and in Postlethwaite's Appeal, 68 Pa., 477, it is said that in giving a construction to the provisions of a testator's will, the Court seeking for his intention should take into consideration his surrounding circumstances—his family, and the amount and character of his property.

This testator left to survive him five children, and two sets of grandchildren, of the latter of which there are eight all told. At his death he possessed personal estate valued at slightly over \$200, and was the owner of two pieces of real estate, No. 604 North Tenth street, and 948 Buttonwood street, both in the City of Reading. The former property, under the direction in the will to convert, was sold for \$3,000. The latter, which consisted of a store stand and a small dwelling in the rear, it has been testified, testator valued the higher of the two. Of this estate, he gave specifically to Rose and Joseph A. Klemmer, two of the children, the property 948 Buttonwood street, encumbered with the mortgage in question, and of the balance, including 604 North Tenth street, after its sale, he gave \$2,000 to each of two remaining daughters, \$200 to a third, a religieuse, and small pecuniary legacies to each of the eight grandchildren. The residue he gave equally to his son and two daughters, Rose Klemmer and Sarah M. Lanshe.

From these dispositions, in the light of subsequent events, it is clear in the first place that testator misapprehended the value of his estate. By the adjudication excepted to it appears that the pecuniary legatees fall short 33.87 per cent. of being paid, and since he contemplated their payment out of the proceeds of 604 North Tenth street, after the application of personal assets to debts and funeral expenses, it is evident that he overestimated the value of that property. The extent of his over-valuation is shown by the amount of the pecuniary legacies, \$4,720; and having thus over-estimated the value of one property, it is probable that he did so with regard to the other, the Buttonwood street property, which he valued the

higher of the two. The testator's intention in the second place thus becomes fairly clear. By giving to this probability the weight it deserves, the Court thinks it evident testator had in mind that the Buttonwood street property, even after payment by the two devisees of the mortgage with which it is encumbered, was worth sufficient to net each of them in the neighborhood of \$2,000, the amount he had given also to each of two other children; and that, consequently, the will shows an intention on testator's part to place his children, excepting the religieuse, on something very nearly like equality, in the disposition of his estate. That that intention would now be defeated if the pecuniary legatees here, including two of the four children, were compelled to contribute from their legacies to the payment of the mortgage on the devised premises, is also apparent, in the opinion of the Court.

This view of testator's intention, the Court thinks, in nowise throws into conflict the two residuary clauses of the will. On the contrary, it but brings them into harmony, giving to each of them the force and effect required by the authorities in the construction of wills. Thus, it leaves no doubt as to the scheme of distribution contemplated by testator. For purposes of distribution he divided his estate into two parts. One part was to remain unconverted, and the other was not. The unconverted part he devised or bequeathed specifically. The other part, the balance remaining, he directed to be converted into money, and of this he bequeathed the special pecuniary legacies enumerated in the will. There then, if his estimated value of the estate had been correct, would have remained a residue; and this residue he also disposed of. From this the meaning of the first residuary clause is obvious. He was there speaking, not of the residue of his estate after the payment of all special legacies. He was speaking of the residue that was to be converted into money. It was not until after this conversion and the payment of the pecuniary legacies that he came to the last clause, and there dealt with the residue of his estate. For only what then remained could have been "the residue," which "in testamentary language," meant whatever was not "specifically devised or bequeathed," and the whole will taken together failing to show that he meant anything else, the last clause should have that meaning: Willard's Estate, *supra*.

The Court concludes, consequently, that to compel the pecuniary legatees to contribute out of their special legacies to the payment of the mortgage on the devised premises, would be to disregard testator's intention. Taken in connection with his apparent over-valuation of his estate, his family and the actual amount and character of his property at his death, the general scheme and special provisions of the will

show an intention to treat his children with a fair degree of impartiality in the division of what he possessed. To compel some of them now to give of their legacies to enhance the value of those of others, the Court believes would defeat that intention. Moreover, there being no residue out of which to pay the mortgage on the devised premises, the result is in the Court's opinion, that Rose and Joseph A. Klemmer must, if at all, take the specific devise of the property, No. 948 Buttonwood street cum onere.

This answers exceptant's question submitted in the fourth paragraph of the exceptions; and the exceptions being to the disallowance of her claim for money advanced for household expenses, are dismissed.

BECKER'S ESTATE.

Wills—Bequests—Religious and Charitable Uses—Memorial Church Window—Intention of Testator—Impossibility of Carrying Out Particular Purpose—Cy pres Doctrine.

1. Where testatrix's general intention was to help to carry on religious work in a particular community and she sought to accomplish this general purpose by bequeathing to the church a sum of money to be used for a particular purpose, and the particular purpose proves impossible, the donor's intention to found a charity will not be frustrated when the general intention can be approximately carried out.

2. When a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity, for equity will substitute another mode, so that the substantial intention shall not depend upon the insufficiency of the formal intention.

3. A bequest for a religious use is a bequest for a charitable use. The charitable use is not destroyed by the mere fact that the motive in making the bequest was to honor the memory of an ancestor.

4. The test of a legal public charity is not the motive of the donor, but the object or purpose sought to be attained.

5. The meaning of the doctrine of cy pres is that when a definite function or duty is to be performed and it cannot be done in exact conformity with the scheme of the person or persons who provided for it, it must be performed with as near approximation to that scheme as reasonably practicable.

6. Testatrix bequeathed \$600 to the New Jerusalem Lutheran Church for the erection of a window in memory of her father to contain an inscription to that effect. At the death of the testatrix the church had been completed and it was impossible to erect the window without impairing the strength and beauty of the walls of the church building. Held: that under the doctrine of cy pres the fund will be distributed to the church for the purpose of carrying out the general charitable intention of the testatrix.

In the Orphans' Court of Berks County.

In the matter of the petition of Benjamin S. Sheetz et al., trustees of the New Jerusalem Lutheran Church, of Rockland Township, praying the Court to open adjudication filed June 29, 1918, in said estate, and make redistribution of the sum of \$600.00 given by the will for a memorial window for said church.

Samuel E. Bertolet for the Petitioners.

Thomas K. Leidy for the Accountant.

Opinion by Schaeffer, P. J., February 1, 1919.—The testatrix died on August 28, 1917, a widow without issue, leaving a will dated January 7, 1913, which was proved and letters testamentary were issued to her executor on October 4, 1917. The executor filed his account and the same was audited on June 4, 1918, and confirmed absolutely on July 13, 1918. In the adjudication we directed the sum of \$600.00 to be impounded in the hands of the accountant "until the purchase and construction of a memorial window in New Jerusalem Lutheran Church in accordance with the instructions in the will." The item in the will pertaining to this bequest is as follows:

"I also give and bequeath out of my estate, to the New Jerusalem Lutheran Church, of Rockland Township, Berks Co., Pa., the sum of \$600.00 in cash, the same to be used by the trustees of the said church in conjunction with my hereinafter named executor, to purchase and erect in the aforesaid church, a suitable memorial window, dedicated to the memory of my deceased father, Samuel F. Ruppert—the said memorial window is to contain an inscription to that effect, and the style and plans of the window and the manner of the erection thereof is to be approved by the trustees of the said church and also by my hereinafter named executor."

On October 19, 1918, the trustees of the church presented a petition asking the Court to open the adjudication, so far as it impounds \$600.00 in the executor's hands, to await the construction of said window and to redistribute said \$600.00 according to law. Petitioners allege that, at the time of the audit and the filing of the adjudication, the New Jerusalem Lutheran Church, which has been rebuilt, was completed—the last work on it having been done in July, 1917. The Court was not informed of this fact at the time of the audit and the trustees were not present when the matter was disposed of. The church building having been fully completed at the time the adjudication and distribution were made, and the trustees alleging that it is impossible to erect a window at this time, without impairing the strength and beauty of the walls of the church building, it is apparent that it may be impossible for the accountant to comply with the order of the Court, impounding the \$600.00 until the construction of a memorial window as contemplated by the will, and that consequently the adjudication should be reopened and corrected so that this amount may be distributed to the party legally entitled thereto.

The trustees of the church contend that since it would be virtually impossible to erect a window as directed by the testatrix, in view of the completion of the church building, and this being a charitable bequest, the law permits distribution of the \$600.00 to them under the doctrine of "cy pres."

The accountant objects to such a distribution on three grounds: (1) that the doctrine of cy pres applies only to charitable or religious uses or trusts; (2) that the bequest here is not a charitable bequest; and (3) that even if it is charitable, the intended diversion is not warranted under the circumstances.

This is a bequest to a religious association, engaged in the promotion of religion, and must therefore be considered a bequest for a religious use. A bequest for a religious use is a bequest for a charitable use: see *McLean et al. vs. Wade*, 41 Pa. 266, because it must be conceded that charity flows largely from the heart of religion.

In law "religious and charitable" uses mean legal acts, done for the promotion of piety among men, or for the purpose of relieving their sufferings, enlightening their ignorance and bettering their condition; such acts courts of equity uphold and effectuate according to the intention of the donor, *pro salute populi*: *Miller et al. vs. Porter et al.*, 53 Pa. 292; *Fire Insurance Patrol vs. Boyd*, 120 Pa. 624, 645. In the light of these authorities it can hardly be doubted that a bequest to a religious body, such as we have in this case, is for a charitable use. In a number of our cases, where the question of what are bequests for religious and charitable uses under the Acts of 1855, 1889, 1895, it has been frequently held, that legacies to religious congregations or societies, which are clearly for the advancement of religion, are for a religious and charitable use: *McLean et al. vs. Wade*, *supra*; *Miller et al. vs. Porter et al.*, *supra*; *Kramph's Estate*, 228 Pa. 455; *Kortright's Estate* (No. 2) 237 Pa. 143; *Centen'l and M. Ass'n of Valley Forge*, 235 Pa. 206. It is contended that the legacy having been given to the church for the specific purpose of a memorial window on which was to appear an inscription showing a dedication to the memory of testatrix's father, strips the bequest of its charitable character, and that consequently, it cannot be regarded as such. The mere fact that testatrix's motive in making this bequest was to honor the memory of her father does not taint it with that degree of selfishness or ambition which might in some cases destroy the charitable use of such a bequest. The direction that a window be erected, which is a part of and a very common thing in a church building, and that it bear said inscription, supports the view that this is a charitable bequest; for to revere and honor the name of parents is not only praise-

worthy but is, indeed, a noble virtue, and one of the fruits of our Christian teaching.

The marking of the bequest with the donor's name or any other distinctive symbol which might savor of pride and selfishness does not take from the bequest its charitable character, for the true test of a legal public charity is not the motive of the donor, but the object or purpose sought to be attained: *Miller et al. vs. Porter et al.*, supra; *Fire Insurance Patrol vs. Boyd*, supra; *Smith's Estate*; *Walker's Appeal*, 181 Pa. 109.

The purpose of the testatrix, running through her whole will, is that her estate should be used for charitable ends; and when she bequeathed this \$600.00 to the New Jerusalem Church, where she and her parents worshipped for many years, her main or general intention was to help the church to carry on its religious work in this particular community, and the matter of directing the money to be used for the erection of a window, was secondary, and only indicates the mode in which her general purpose was to be accomplished. If the particular intent fails, the general intent will prevail, and the donor's purpose to found a charity will not be frustrated when such general intent can be approximately carried out: *Toner's Estate*, 260 Pa. 49.

This rule is a broad one, and prevails, not only in the construction of wills, but has equal force in the construction of contracts. It was applied to a bequest of this character in *City of Philadelphia vs. Girard's heirs*, 45 Pa. 28-9, where Lowrie, C. J., said: "Possibly some of the directions given for the management of this charity are very unreasonable, and even impracticable; but this does not annul the gift. The rule of equity on this subject, seems to be clear, that when a definite charity is created, the failure of the particular mode in which it is to be effectuated, does not destroy the charity, for equity will substitute another mode, so that the substantial intention shall not depend on the insufficiency of the formal intention." Of the operation of the principle of constructing *cy pres*, he said: "The meaning of the doctrine of *cy pres*, as received by us is, that when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who provided for it, it must be performed with as near approximation to that scheme as reasonably practicable; and so, of course, it must be enforced."

In *Cresson's Estate*, 25 Dist. R. 1015, 1016, Judge Anderson says:

"It has long been a familiar doctrine that where a charity cannot be carried out exactly as directed by the donor or testator, courts of equity will allow a modification of the gift so that the general purpose of the charity may be accomplished,

though the exact letter of the donor's instructions be infringed; the thought being that the charitable purpose of a testator shall not altogether fail though the mode of its exercise be not exactly that which the testator directed. This is an ancient doctrine of the law, and it is universally administered in this country as well as in England. The principle is succinctly stated by Judge Story, as quoted in Philadelphia's Petition, 2 Brewster, 468: 'Where a literal execution becomes inexpedient or impracticable, the court will execute it as nearly as it can according to the original purpose, or (as the technical expression is) *cy pres*.'

And in Lower Dublin Academy, 8 W. N. C. 564, Judge Allison says: "In the case of the City of Philadelphia vs. Girard's Heirs, 9 Wright, 9, the doctrine of *cy pres* is recognized as in force in Pennsylvania. The meaning of the doctrine as received by us is held to be that, when a definite duty or function is to be performed, and it cannot be done in exact conformity with the scheme as established, it must be performed with as close an approximation to that scheme as is reasonably practicable, and in this manner it must be enforced."

And that this is still the law in Pennsylvania appears from Daly's Estate, 208 Pa. 58, and Hamilton vs. Mercer Home, 228 Pa. 410.

A case which is on all fours with the case at bar and rules the facts here, was decided in this Court by the late President Judge Bland in the Estate of Clara P. Harrison, deceased, No. 23 November Term, 1905, in an adjudication filed January 31, 1906. In this estate the decedent disposed of the residue as follows: "After all expenses are paid, I give the rest of my money in bank and in bonds to my church, The P. Episcopal Church, Christ P. Episcopal, 5th & Court Sts., Rev. Dr. Orrick to have three windows put in the ceiling of the church. 1st Baptism, 2nd window Confirmation, third window Ascension." A petition was presented to the Court by the executor and the next of kin, averring that they were informed that the Rector and Vestrymen did not propose to put in the ceiling the windows as provided in said will, and asked the Court for a citation on the church authorities to show cause why they should not be put to an election and state whether they would accept the legacy with the condition annexed. Judge Bland held: First, that since this was a bequest for a charitable use, where the "testator had made no special provision for reversion to himself or his heirs in a gift over upon a given contingency, the State has the exclusive right to control the use of the trust property, and the only private persons having an interest in the trust property, enabling them to interfere as to its use, are the beneficiaries of the trust; who in this case are the members

of Christ Church"—this view is also supported by the late cases of Kortright's Estate, (No. 2), *supra*, 143, 149; Dougherty's Estate, 25 Dist. R. 1111; second, that the direction to put three windows in the ceiling is not a condition precedent and no part of the gift, and does not prevent the present vesting of the legacy; third, that the general intent of this bequest was to give to her church the residue of her estate for the spiritual edification of its members; and even though the Vestrymen would not put in the windows, under the doctrine of cy pres, they could use the money for the church and thus carry out the general purpose of the testatrix.

From the evidence submitted in the case at bar it is very apparent that it is not an easy matter, if at all possible, to erect a window in this new church building such as was contemplated by the testatrix. It appears that the only place a window of the size and value warranted by the bequest, could be erected is in the rear wall of the church, back of the pulpit, on account of the supporting trusses in the other walls. Mr. Heilman, the architect, who superintended the erection of the church, says that it is not practicable nor feasible to open the new wall, which is a stone wall covered with cement plastering, without impairing the strength and general appearance of the same. The testimony of William Eckert, the stonemason and cement contractor, who constructed the wall, is to the same effect.

We believe that under the circumstances it is impracticable to put in this window, and that by placing a painting on the wall and marking this as a memorial to testatrix's father, as suggested by the trustees, or by using the money for a purpose connected with the work of this church, the general intention of the testatrix will be carried out.

My conclusion is that the church is entitled to the bequest. The distribution is amended accordingly, and the accountant is directed to pay the bequest to the trustees of the New Jerusalem Lutheran Church.

OWEN'S ESTATE.

Decedents' Estates—Enforcement of Contract of Decedent for Sale of Land—Equity—Jurisdiction of O. C.—Act 24 February 1834, P. L. 70—Act 28 April 1899, P. L. 157—Orphans' Court Act of 1917—Leases—Interpretation—Extension of Right to Purchase—Meaning of "To Extend."

1. The Act 24 February 1834, P. L. 70, granting to the Orphans' Court jurisdiction to enforce contracts for the sale of real estate where the vendor died seized or possessed without having made provision for the performance of the contract was superseded by the Act

28 April 1899, P. L. 157, enlarging the scope of the Act of 1834, and the Orphans' Court Act of 1917 does not change the law in this respect.

2. Courts will, if they can, give to the contracts of the parties the exact effect which the parties themselves gave to them, and interpret them just as they interpreted them.

3. "To extend" means to enlarge, to expand, to increase that which already exists, and does not mean the creation of something new. The extension of a right to purchase land granted by the terms of a lease conveys the right to purchase under terms that were fixed in the lease when the right was originally granted.

4. Testator during his lifetime leased a tract of land in 1908 for a term of 5 years and gave the lessees the right to purchase the demised premises for a stipulated sum within one year from the date of the lease. The term was extended from time to time until 1916, when the lessor again renewed the lease by endorsing on it, "The lease is extended for two years to Dec. 2, 1918, and also the right to purchase extended to same date." The lessee continued in possession, paying the same rental as fixed in the lease originally and made further improvements on the premises. The lessor having died on January 17, 1917, the lessees appeared in the Orphans' Court asking for a decree of specific performance averring a tender of the stipulated consideration to and its refusal by the executors of the lessor. The executors by demurrer resisted the decree on the ground that the extension of the lease and the right to purchase were given without consideration. **Held:** that the renewal of the lease and the agreement of the lessees to pay a certain rent constituted a sufficient consideration for the renewal of the right to purchase, and demurrer overruled.

In the Orphans' Court of Berks County.

In the matter of the petition of The Globe Rendering Company, praying for a citation directed to the executrices and devisees of said decedent, to show cause why a decree of specific performance of an agreement for the sale of real estate should not be entered and a deed thereto executed and delivered to said petitioner.

Snyder, Zieber & Snyder for the Petitioner.

Edgar S. Richardson for the Executrices.

Opinion by Schaeffer, P. J., February 1, 1919.—This is a petition by the Globe Rendering Company, a corporation of the State of Pennsylvania, and doing business at Millmont, Berks County, asking for a decree of specific performance, of an agreement for the purchase of land made with Benjamin F. Owen, during his lifetime.

The petitioner alleges that Benjamin F. Owen, late of the city of Reading, died on January 17, 1917, testate, and that letters testamentary on his estate were granted to Mary L. Steinmetz, Addie C. Owen and Rachael A. Owen Hancox; that Mr. Owen died seized of a piece of ground situate on the eastern side of Oakland avenue, being a part of Millmont, in Cumru Township, said county; that on September 9, 1908, he leased the said property to B. F. Miller, Robert O. Rothermel and Morris Adams, of this city, trading as the Globe Refining Company, for the term of five years, and on March 29, 1909, by written endorsement on said lease, Owen and the Refining

Company transferred the said lease to the Globe Rendering Company, the petitioner here; that Owen in said written lease gave to the petitioner the privilege of purchasing the said leased premises, at any time within one year from the date of the lease, for the sum of \$4,000; that the lease and privilege to purchase were renewed and extended from time to time, and that the last renewal was on May 2, 1916, when Owen endorsed the following on the lease: "1916, May 2, The lease is extended for two years to Dec. 2, 1918, and also the right to purchase extended to same date;" that petitioner is in possession of said property, has made valuable improvements to the same, and that it would be unfair to it if the agreement to purchase would not be enforced; that it at different times notified the said executrices that it was ready to purchase said property and tendered to them on April 9, 1918, the full amount of \$4,000, the purchase money named in the agreement, and also a deed for execution and delivery.

The executrices have demurred to the petition, the grounds specified being—(1)—(8), that it does not appear on the face of the petition that the contract to purchase, which the petitioner seeks to enforce, is a legally binding contract which a court of equity will specifically execute or enforce, because there is no consideration for the renewal of the option to purchase, and because it lacks mutuality of remedy, the words "right to purchase" used in the last renewal, since they do not mention the purchase price, are too uncertain and vague to warrant the interference of a chancellor; (9) that the petitioner continued to pay rent after the exercise of the right to purchase and is therefore estopped from claiming title to the property; (10) that the petitioner is not a party to the original lease or agreement and has therefore no rights here; and (11) that this Court has no jurisdiction of this proceeding.

(1)—(8). The contract to purchase in the lease dated September 9, 1908, reads as follows:

"It is hereby agreed and understood by and between the parties hereto that the said lessees shall have the privilege of purchase the hereby leased premises at any time within one year from the date of this lease for the sum of four thousand (\$4,000) dollars."

It cannot be doubted that if the petitioner had elected to take the property within the period fixed, on September 9, 1908, this contract or option to purchase would have become absolute and binding on both parties. It has been repeatedly held by our Supreme Court that an agreement for the purchase of land at the option of the vendee is not devoid of mutuality and that on election and notice it will be enforced: *Corson vs. Mulvany*, 49 Pa. 88; *Smith & Fleek's Appeal*, 69 Pa. 474; *Barnes vs. Rea*, 219 Pa. 279.

It is virtually admitted by the respondents that if the option to purchase had been exercised during the first year following the signing of the lease, the contract would have been enforceable and the question of want of consideration and want of mutuality of remedy could not have been raised effectively in the light of the above decisions. It is, however, contended that the question in this case is not the validity of the option to purchase in the lease itself, but the validity of an alleged contract to extend or renew this option or right to purchase, which had previously expired.

It appears by endorsements on the indenture that Mr. Owen, from time to time, extended the term of the lease and option to purchase—the last extension being dated May 2, 1916, in Mr. Owen's own handwriting and over his signature, being as follows: "May 2, 1916, this lease is extended for two years to Dec. 2, 1918, and also the right to purchase extended to the same date. B. F. Owen."

The first extension of the option to purchase was from September 9, 1909, to September 9, 1911. The next endorsement appearing on the lease is an extension of the option from December 17, 1912, for the period of two years, and after that down to May 2, 1916. It will be noted that from September 9, 1911, to December 17, 1912, there was nothing said about the option to purchase so far as the lease shows. In other words, in the extension of the option from September 9, 1909, to May 2, 1916, there was a hiatus of a little more than a year. It is contended that this lapse and failure to renew on September 9, 1911, ended all rights under the option, that it ceased at that time, and that all renewals thereafter were not binding, because there was a want of consideration. There might be some force in this position if only the option had been renewed after the lapse between September 9, 1911, and December 17, 1912, without further negotiations on the lease. But the endorsement shows that on May 2, 1916, the lease and the right of purchase were extended simultaneously for the term of two years. The renewal of the lease, agreeing to pay a certain rent, etc., was a sufficient consideration for the renewal to purchase, for it is not likely that the petitioner would have paid this rent and continued to equip the property to meet the needs of its business without renewed privilege to purchase. Thus the position that there was no consideration to support the renewal of the option to purchase given on May 2, 1916, is not sound, because the lease was renewed at the same time and the agreement to pay rent must be regarded as sufficient consideration for the lease and the right to purchase. The conclusive presumption is that the tenant—the petitioner—would not have agreed to a renewal of the lease and the payment of rent without securing the right to purchase.

The respondents argue that it is difficult to say what the true, definite meaning of the words "and also the right to purchase extended to the same date B. F. Owen," is, and that consequently the contract is not enforceable in equity. It will be observed that the first part or clause of the endorsement which relates to the extension of lease is in language similar to that used in the renewal of the right to purchase, viz: "May 2, 1916 This lease is extended for two years to Dec. 2, 1918." The parties on both sides have construed this to mean a leasing under the old terms and conditions, the same rental having been paid and accepted, as stipulated in the original lease. In the contract of the renewal of the lease no rent is specified or is any other condition mentioned, and yet the parties considered the contract as binding and as leasing for the old rental of \$30.00 per month. Why the words "the right to purchase extended" should not be regarded as a renewal of the right to purchase for the sum of \$4,000.00, as appears in the original lease, we do not see, in view of the fact, that the parties considered the words "lease extended for two years" as leasing under the old terms and conditions, and yet the amount of rental was not named. Owen by the acceptance of the same rental after May 2, 1916, as he had been receiving before, has declared that by terms "the lease is extended for two years" he meant a renewal of the lease under the former rental and conditions. Extension of the right to purchase, therefore, undoubtedly means, as in the extension of the lease, the right to purchase as specified in the original option, viz: for the sum of \$4,000.00. Courts will, if they can, give to the contracts of the parties, the exact effect which the parties themselves gave to them, and interpret them just as they interpreted them: Gillespie, Appellant vs. Iseman, 210 Pa. 1.

Moreover the word "extended" supports the view that the "right to purchase" here means to purchase for \$4,000.00, as originally specified. To extend, means to enlarge, to expand, to increase that which already exists, and does not mean the creation of something new. Consequently when Owen extended the right to purchase, he gave to the petitioner the right to purchase under terms that had already been fixed, viz: for \$4,000.00.

(9) The fact that the petitioner has continued to pay rent after exercising its rights under the option does not in our opinion estop it from claiming its right to have the contract to purchase enforced. While it may be true that when it exercised its rights under the option, the relation of landlord and tenant ceased, yet if petitioner voluntarily continued to pay rent, which it was no longer obliged to do, we do not see why the respondents, who accepted it, should complain.

The decision in *Knerr vs. Bradley*, 105 Pa. 190, cited by respondents, has no bearing here. That case holds that no rent can be collected from the vendee after he has given notice to take under the option; but from this it cannot be inferred that if the vendee is generous enough to continue to pay rent, the very thing that the vendor sued the vendee for in *Knerr vs. Bradley*, it loses its rights under the contract to purchase because the relation of landlord and tenant no longer exists.

(10) The original contract under seal provides that, "This indenture shall bind all persons claiming under the parties hereto in whatever character, as fully as if they were in every instance herein named." This language undoubtedly answers the objection that the petitioner, who is an assignee, has no standing here and no rights under the contract.

(11) Since 1834 the Orphans' Court has had jurisdiction to enforce contracts for the sale of real estate where the vendor died seized or possessed without having made provision for the performance of the contract. The Act of February 24, 1834, P. L. 70, provided an equitable remedy in such cases as this, and was superseded by the Act of April 28, 1899, P. L. 157, enlarging the scope of the original Act. The new Orphans' Court Act of 1917 does not change the law in this respect.

The demurrer is overruled and the rule to show cause is made absolute.

MERTZ vs. GREENWICH TOWNSHIP.

Negligence—Townships—Road—Bridge—Automobiles — Contributory Negligence.

In an action for damages to an automobile it appeared that the plaintiff while driving his car along a country road in broad daylight turned off the beaten part of the road onto grass and weeds along the side causing the hind wheels to skid just as the car approached a bridge without guard rails. The automobile fell over the side of the bridge into a creek below. The Court granted a non-suit on the ground of contributory negligence, holding that even if the township was negligent in allowing grass to remain on the road, it could have been seen and avoided by the plaintiff, and that the absence of a guard rail on the bridge was such a conspicuous danger that a reasonable use of eyesight would have avoided it.

In the Court of Common Pleas of Berks County.

No. 28 January Term, 1918.

Trespass for damages to automobile. Nonsuit.

Rule to take off nonsuit.

D. N. Schaeffer & Son for plaintiff and rule.

John B. Stevens for defendant.

Opinion by Wagner, J., February 3, 1919.—Plaintiff brought this suit against the defendant for damages that occurred to his automobile in an accident that took place on August 12, 1917, when, after skidding, it fell from the side of a bridge into the creek. The negligence alleged is defendant's failure to keep the grass and weeds from the road and the failure to have the bridge guarded with guard rails. The motion for a nonsuit was allowed upon the ground that the evidence plainly showed a case of contributory negligence on the part of the plaintiff.

Plaintiff testified that he was traveling upon an ordinary country road from the Three-Mile House to Lenhartsville. This road crosses a railroad, and immediately beyond makes a curve. A bridge, 25 feet wide, was located across this road a distance of 60 feet from the railroad crossing. He stated that the automobile was going at a rate of from 12 to 15 miles an hour. He claimed that immediately after crossing the railroad the left hind wheel of his automobile got upon the grass, that this caused the automobile to skid, which threw it over towards the bridge. There it momentarily stopped and then fell over the side of the bridge into the creek.

It is plain that plaintiff's running off the beaten part of the road on to the grass, which, according to his contention caused the hind wheel of the automobile to skid, was the cause of the accident. The beaten part of the road was at least $12\frac{1}{2}$ feet wide. The time of the accident was broad daylight. There was a rise of from $2\frac{1}{2}$ to 3 feet as he approached the railroad crossing. Beyond the crossing the descent was 7 or 8 feet to the bridge. He testified that he knew that the road beyond the railroad crossing turned to the right. He admits that the beaten part of the road was amply wide enough for his machine, and of this there is no question. This rise was therefore not sufficient to so obstruct the view of a person sitting in an automobile as to cause him to run off the beaten road. The grass complained of was 10 or 12 feet beyond the railroad crossing, and this he said he saw when he was upon the crossing. This again must necessarily have been the case, if he was looking where he was going. He also testified that at the rate of speed at which he was traveling he could have stopped his machine within a distance of 5 or 6 feet. It is inconceivable then what there was to prevent him, under these undisputed facts, from keeping his automobile upon the beaten part of the road. Plaintiff cannot explain it. When asked (N. of T., p. 18), "What prevented you, going at a speed of 12 or 15 miles an hour, from keeping on the track?" he answered, "Well, I didn't measure that grass." When again questioned, "What was to prevent you?" he gave no answer. He again did not answer when further questioned, "Well, then, if you can stop

within 5 or 6 feet, with your machine, what was to prevent you from seeing the beaten track?" When again asked, "Can't you answer?" he still failed to do so. And then when questioned, "You have no answer for that?" he said, "No, sir."

It is very clear that under the state of facts as testified to by him, if such are the real facts, and if they are not, it is for him to disclose what the real facts are, that there was no occasion for him to run his machine off the beaten path. Such being the case, even if there was negligence in the defendant, in allowing this grass to remain upon the road as testified to, the grass could be seen by the plaintiff, he could have avoided it, and not having done so, his negligence contributed to the accident.

It is, however, claimed by the plaintiff that because the car, after skidding, going at the slow rate of speed testified to by him, did in some unexplained way get across the beaten path of the road, down to the bridge, 40 feet away, momentarily stopped in a perilous position, and then fell down from the bridge, that the failure to have guard rails was negligence on the part of the township. Even if the failure to have guard rails was negligence, plaintiff could see that this 25 feet wide bridge did not have them. His own act placed his automobile in a perilous position along the side of the bridge. As is stated in *Beer vs. Clarion Township*, 17 Pa. Superior Ct., 537, at page 540: "If it was negligence on the part of the township not to have a guard rail on the right-hand side of the bridge, it was so conspicuous a danger that a reasonable use of eyesight would have avoided it in the exercise of rational care and caution."

Rule to take off nonsuit is discharged.

ALEXANDER'S ESTATE.

Decedents' Estates—Wills—Construction—Designation of Charity by Misnomer—Issue—"Children" Comprehending Grandchildren—Conflict of Laws—Jurisdiction.

1. Testator by will dated 1911 provided that following the death of a life beneficiary the residue of his estate should be paid in equal shares to certain charities, among which was named "The Reading Tuberculosis Society." At the time of the testator's death there was no society by that name, but there were two local charitable organizations for tubercular treatment: one, The Reading Sanatorium for Treatment of Tuberculosis, which had been incorporated before the will was made; the other, The Berks County Tuberculosis Society. The evidence established that until 1911, before the organization of the latter society, testator intended to give to a local tuberculosis society a share of his residuary estate, and the only society of such character in existence at the time was The Reading Sanatorium for Treatment of Tuberculosis. **Held:** that the testator's description of the charity was sufficient to identify it as The Reading Sanatorium for Treatment of Tuberculosis.

2. Testator created a trust fund for his sister, Lillian, during her life and directed that upon her death the principal should be divided among certain named legatees, providing, "And should any of said legatees be deceased, without issue, at the time of sister Lillian's death, the share of such legatee shall go to the surviving legatees, the children of deceased legatees taking their respective parent's share." Certain of the legatees, citizens of Massachusetts, died after the testator and before the life beneficiary. Held: (1) that the legatees named took a vested estate in their respective legacies subject to be divested, during the lifetime of the testator's sister, Lillian, either by their deaths without issue, or by their deaths leaving issue, in the latter of which events the issue took by substitution of the parents; and, (2) that the domicil of the testator having been in Pennsylvania, the will having been made, and the situs of the property disposed of being in the same state, the distribution must be governed by the law of the domicil.

3. The word "children" does not comprehend grandchildren, or issue generally, unless: (1) utter necessity requires it, which occurs when the will would remain inoperative unless the sense of the word "children" were extended beyond its natural import; or, (2) the testator has clearly shown by other words that he did not intend to use the word "children" in the proper actual meaning, but in a more extended sense.

In the Orphans' Court of Berks County.

In the matter of the adjudication of the account of the Reading Trust Company, Trustee.

E. Carroll Schaeffer for the Accountant.

John M. Frame for the Berks County Tuberculosis Society.

Snyder, Zieber & Snyder for the Reading Sanitorium for the Treatment of Tuberculosis.

R. G. Bushong for Bertha Morrison.

E. H. Deysher for Hattie Smith.

Opinion by Schaeffer, P. J., February 4, 1919.—The decedent died on the 24th day of November, 1912, testate, by his last will and testament, having disposed of that part of his estate embraced in the account as follows:

"Clause 3. I give and bequeath to my sister, Lillian O. Alexander, the sum of Twenty-five Thousand (\$25,000) Dollars, for and during the term of her natural life, the same to be paid over to some responsible trust company, to be selected by my executors hereinafter named, IN TRUST, to invest the same in good securities as aforesaid, and pay the interest thereof as it shall accrue to my said sister during her life, and at her death, Five Thousand (\$5,000) Dollars each to my three aunts, to wit: Mrs. Elvina Morrison, Mrs. Lois Lyman, and Mrs. Nettie Rust, of East Hampton, Massachusetts; and to cousin Daisy Cooley, of East Hampton, Massachusetts; and Twenty-five Hundred (\$2500) Dollars each to Jennie Boyer and Mary Boyer. And should any of said legatees be deceased, without issue, at the time of sister Lillian's death,

the share of such legatee shall go to the surviving legatees, the children of deceased legatees taking their respective parent's share.

"Clause 12. All the rest, residue and remainder of the proceeds of my real and personal estate, after the payment of the above devises, legacies and bequests, and inheritance taxes as hereinbefore provided, shall be placed in the care and custody of such trust company as my hereinafter named executors may select, with the consent and approval of my sister, Lillian O. Alexander, to be held by said trust company, IN TRUST, to invest in good securities as aforesaid, and to pay over the income thereof to my said sister, Lillian O. Alexander, as it may accrue, for and during the term of her natural life, and after her death the principal thereof, and after the death of my wife Mary, the One Hundred Thousand (\$100,000) Dollars invested for her use, as provided in Clause 2 of this will, also shall be paid in equal shares to the following charities, namely: The Home for Friendless Children, The Home for Widows and Single Women, The Reading Tuberculosis Society, The Humane Society, St. Joseph's Hospital, The Reading Hospital, all of the City of Reading aforesaid or vicinity, and the Tipton Orphans' Home, at Tipton, Berks County.

"The bequest to the foregoing charitable institutions is made with the proviso that the principal, and not the interest only thereon of their pro rata share, shall immediately become active to the increased comforts of the inmates of each of the foregoing institutions, letting the future provide for the future that those now living be made more comfortable and better provided for."

Lillian O. Alexander, life beneficiary of the several funds accounted for, died August 12, 1918; and the trusts for her benefit having terminated, the trustee has filed this account. It contains principal and income accrued to date of life beneficiary's death. Of principal, the balance for distribution, is shown to be \$91,914.48, and of income, \$921.30. The income is now distributable to E. Carroll Schaeffer, executor of the will of the deceased life beneficiary; and in the distribution will be kept separate from principal.

With regard to the distribution of the principal fund, several questions were raised at the audit. In relation to these, it is to be noted, first, that the corpus here is made up of two funds: one being a special legacy of \$25,000.00, the subject of Clause 3 of the will, and the other, the residue of the estate, disposed of by Clause 12. It is with respect to the latter clause that one question was raised. Testator there provided that following the death of this life beneficiary, the residue of his estate was to be paid in equal shares to certain

charities. Among these appears "The Reading Tuberculosis Society;" and there now being in this county two such societies—one, the Berks County Tuberculosis Society, and the other, The Reading Sanitorium for Treatment of Tuberculosis—and both having appeared as claimants for a share in the fund, it became a question which testator had in mind at the execution of his will.

Testimony was submitted in behalf of The Reading Sanitorium for Treatment of Tuberculosis. This showed the date of the society's charter, by decree of the Court of Common Pleas of this county, on November 21, 1909; that no other society of this character had been in existence in this county then, prior thereto, nor for several years thereafter; that testator, at or about the time of the organization of the Reading Sanitorium for Treatment of Tuberculosis, in several conversations with one of its officials had indicated an intention to provide for it in his will; and that in three prior wills, written in 1908, 1909, 1910, respectively, before the organization of The Berks County Tuberculosis Society, he had given a share of his residuary estate to a society of this character, which he called "The Home for Consumptives." From this evidence the Court thinks it quite clear that his former dispositions to "The Home for Consumptives" could not have been intended for The Berks County Tuberculosis Society, for the simple reason that the latter society was not in existence at that time. The only one in existence at the time was The Reading Sanitorium for Treatment of Tuberculosis; and while in his former wills he failed to designate it by its corporate name, the Court is of the opinion that his description was sufficiently inclusive to identify it as the legatee he had in mind. That this institution, when he wrote his last will, had not changed, is indicated by the scrivener who testified that in drawing the present instrument he used as a guide another prior will of 1911. In Clause 14 of the present will the 1911 will is referred to, for the purpose of making an alternative bequest of the residue to the charities named therein, in case of testator's death within a calendar month of the date of this one; and the residuary clause of the 1911 will contains the name of The Reading Tuberculosis Society. The evidence establishes, consequently, that until 1911, before the organization of the Berks County Tuberculosis Society, testator intended to give to a local tuberculosis society a share of his residuary estate; that the only society of such character in existence at the time was The Reading Sanitorium for Treatment of Tuberculosis; that under these circumstances testator's description of the charity was sufficient to identify it as the last named society; and that having directed the incorporation of the same name in the present will, testator had no wise changed his intention with

respect to, and meant to give a share of his residuary estate to The Reading Sanatorium for Treatment of Tuberculosis. That The Berks County Tuberculosis Society agrees with this view is indicated by their action, following the submission of testimony, in withdrawing their claim to participate in the distribution.

The other, and more important questions presented at the audit arose out of Clause 3 of the will, with respect to the special legacy of \$25,000.00 for the use of the deceased sister, Lillian O. Alexander, and relate to the persons who now take the fund. The clause in question reads as follows:

"Clause 3,—I give and bequeath to my sister, Lillian O. Alexander, the sum of Twenty-five Thousand Dollars for and during the term of her natural life, the same to be paid over to some responsible trust company to be selected by my executors hereinafter named in trust to invest the same in good securities as aforesaid and to pay the interest thereof as it shall accrue to my said sister during her life and at her death, five thousand dollars each to my three aunts, to wit: Mrs. Elvina Morrison, Mrs. Lois Lyman, and Mrs. Nettie Rust, of East Hampton, Massachusetts; and to cousin Daisy Cooley, of East Hampton, Massachusetts; and twenty-five hundred dollars each to Jennie Boyer and Mary Boyer: And should any of said legatees be deceased, without issue, at the time of sister Lillian's death, the share of such legatee shall go to the surviving legatees, the children of deceased legatees taking their respective parent's share."

Of the legatees named in this clause, besides the life beneficiary, Elvina Morrison, one of the aunts, died January 18, 1913, leaving to survive her the following issue, viz:

1. Joseph Morrison, a son;
2. Hattie Smith, a daughter;
3. Issue of Nellie Bates, a daughter, who pre-deceased testator, viz:
 - a. Bertha M. Bates, a granddaughter.

Lois Lyman, another one of the aunts, died January 24, 1916, leaving to survive her the following issue, viz:

1. Daisy Patten, a daughter;
2. Lois Patten, a daughter;
3. Frank E. Lyman, a son.

Daisy Cooley, the cousin, died July 6, 1916, without issue. The remaining legatees are living and of full age.

Certain of these legatees having died after the testator and before the life beneficiary, the questions raised on the distribution of the fund are:

1. Is the fund distributable, and the will to be construed, under the laws of Pennsylvania or of Massachusetts?

2. Does Bertha M. Bates, granddaughter of the deceased aunt, Elvina Morrison, participate in the distribution of her deceased grandmother's share and in the share of the deceased cousin, Daisy Cooley?

The latter question involves two others: (a) what was the nature of Elvina Morrison's estate in the fund for distribution? and (b) is the term "children" in the latter part of the bequest to be extended to embrace grandchildren?

As to the first question, we think there is no doubt whatever about the answer. This is a Pennsylvania will disposing of personal property; the situs of the property is here, and the domicile of the testator was here. In face of these facts, the construction of the will and the distribution of the fund must be governed by the law of the domicile: *De Renne's Estate*, 15 Phila., 566; *Moore's Estate*, 15 D. R. 39.

Taking up the second question, we think the first thing to be determined is the character of the estate created by the will in the aunt, Elvina Morrison, now deceased. Counsel for Bertha M. Bates, the granddaughter, contends that her grandmother took a vested estate in \$5,000.00, a fifth of the fund; and while subject to be divested by her death, without issue, before the life beneficiary, the contingency never having happened, neither did the divestiture, and the fund should now be distributed to her personal representative. It may be noted parenthetically at this point, that if this contention is true of Elvina Morrison's share in the fund, it is also true of that of Lois Lyman, the other aunt, likewise, at her death, survived by children.

There is no doubt in the Court's mind that clause 3 of this will, at testator's death, vested an estate of some sort in the legatees to whom it was given after the life beneficiary. The clause contains two sentences. In the first, testator gave and bequeathed to his sister Lillian O. Alexander \$25,000.00 for life, to be administered by some responsible trust company in trust, the interest to be paid to her during life, and the principal, at her death, in specific amounts, to certain persons all named. If clause 3 stopped right there, no doubt would exist as to the character of the estate created. It would be a vested, indefeasible estate. "For wherever there is a particular estate, the determination of which does not depend on any uncertain event, and a remainder is thereon absolutely limited to a person in esse and ascertained, in that case, notwithstanding the nature and duration of the estate limited in the remainder may be such, as that it may not endure beyond the particular estate, and may therefore never take effect or vest in possession, yet it is not a contingent, but a vested remainder. . . .": *Bair's Estate*, 255 Pa. 169; see also *Rau's Estate*, 254 Pa. 464. Were clause 3 of our will to stop at the

point indicated, this rule would fit the case exactly. The particular estate was in Lillian O. Alexander; its determination depended upon her death, no uncertain event; and the remainder was limited to persons in esse, and all ascertained. With no more to the clause, therefore, these remaindermen would have taken a vested interest in the fund.

But the clause does not stop at the point indicated; and it is in what follows that the vested estate first given to the remaindermen is modified. For the last part of the clause reads: "And should any of said legatees be deceased, without issue, at the time of sister Lillian's death, the share of such legatee shall go to the surviving legatees, the children of deceased legatees taking their respective parent's share." Undoubtedly, this language qualifies the estate to the remaindermen in the first part of the clause, but the question is to what extent. Counsel for Bertha M. Bates, granddaughter of a deceased aunt, contends that it meant merely a divesting of the estate first created in the remaindermen, in case any died without issue; and that, consequently, Elvina Morrison, having left issue at her death, never had been divested of her estate in the \$5,000.00.

We think this contention is correct, so far as it goes, but that it does not go quite far enough. In *Neel's Estate*, 252 Pa. 394, the bequest was, "I do hereby will and bequeath all my property and estate that shall be in charge of said trustees, . . . at the time of the decease of the said Adella (life tenant) to and among the children of the said Adella, . . . provided that the said Adella shall leave at her decease any such children. . . . And in case that the said Adella shall not at her decease leave any such child . . . then and in that case, I will, devise and bequeath all my property and estate so in charge of my said trustees . . . at the death of Adella to and among my brothers and sisters, share and share alike, the children of any now or then deceased brother or sister to represent his or her parent and take the share he or she would take if living." Adella, the life tenant, died without issue; some of the brothers and sisters had also died, leaving issue, and the Supreme Court said, "the estates given to the brothers and sisters were always subject to be divested, during the life of Adella, first, by the latter dying leaving children (*Packer's Estate* (No. 2) 246 Pa. 116), and next by any of the former dying leaving children (*Carstensen's Estate*, 196 Pa. 325, 335; *Massey's Estate*, 245 Pa. 289, 297). The first of these contingencies did not happen, and wherever the second occurred the auditor properly substituted the children, or their personal representatives, instead of their deceased father or mother." From this it is evident that while counsel for Elvina Morrison's granddaughter took the first step in this course of

reasoning, he did not take the second. This step it is now necessary to take; and taking it, the Court concludes that the legatees in remainder enumerated in clause 3 of the will, at the death of testator, took a vested estate in their respective legacies, subject to be divested, during the lifetime of Lillian O. Alexander, either by their deaths without issue, or by their deaths leaving issue, in the latter of which events the issue to take by substitution of the parents.

The last question to be answered involves the right of Bertha M. Bates, the granddaughter, to take at all under this will. Counsel for Hattie Smith, daughter of Elvina Morrison, deceased, contends that she is not entitled to take because as he alleges the gift over is limited to children of deceased legatees, and therefore does not embrace grandchildren. The language of the clause is, "should any of said legatees be deceased, without issue, . . . the share of such legatee shall go to the surviving legatees, the children of deceased legatees taking their respective parent's share."

Here there is an implied gift to issue, by bequest over in the absence of issue (Mast's Estate, 2 W. N. C. 404); and the use of the word "children" in this connection seems to bring it within the following rule: "Under a bequest to children, grandchildren and other remote issue are excluded unless it be the apparent intention of the testator, declared by his will, to provide for the children of a deceased child. But such construction can only arise from a clear intention or necessary implication, as where there are not other children than grandchildren or when the term 'children' is further explained by a limitation over in default of issue. The word 'children' does not ordinarily, and properly speaking, comprehend grandchildren, or issue generally. Their being included in that term is only permitted in two cases, viz: from utter necessity, which occurs when the will would remain inoperative unless the sense of the word 'children' were extended beyond its natural import, and where the testator has clearly shown by other words that he did not intend to use the term 'children' in the proper actual meaning, but in a more extended sense: Hunt's Estate, 133 Pa. 260; Barnitz's Appeal, 5 Pa. 264; Harwitz vs. Norris, 49 Pa. 213; Castner's Appeal, 88 Pa. 478;" Steinmetz's Estate, 194 Pa. 611. This has been the unbroken rule since Hollowell vs. Phipps, 2 Whart. 37, just recently having been again reaffirmed by the Supreme Court in Puterbaugh's Estate, 281 Pa. 235. We think it applicable to this case. The gift over here is, in default of 'issue,' to surviving legatees, or their 'children.' As already stated, the gift to 'issue' being implied by the bequest over in default of issue, it follows that in testator's use of the general term 'issue' we have the 'other' word indicating his intention to use the term 'children,' not in the proper actual

meaning, but in a more extended sense. Within the general term 'issue,' in other words, more than just children are embraced; and while he himself, by his language, was content to rest with the inclusion of 'children,' it by no means follows that, either expressly or by fair implication he meant also to exclude grandchildren. For both children and grandchildren are embraced by the general term 'issue,' and that testator is presumed to have known. Were we to construe his language otherwise, the strange anomaly might be presented here, of the existence of a granddaughter, issue of Elvina Morrison, deceased, rendering inoperative the gift over, yet, in the absence of children, being herself excluded from taking it. That sounds like an absurdity; and certainly could not have been testator's intention. It was, rather, that issue of deceased legatees, including children and their descendants, should take their deceased parent's share in the fund. This would include Elvina Morrison's granddaughter, Bertha M. Bates; and the Court concludes, therefore, that she is entitled to take her deceased parent's share in that part of the fund for distribution.

COMMONWEALTH vs. STEIN.

Criminal Law—Evidence—Testimony of Accomplice—Corroboration—Instruction to Jury—Reasonable Doubt.

1. While it is a well established rule that it is the duty of the Court to admonish the jury of the danger of convicting upon the uncorroborated testimony of an accomplice, this rule does not require the Court to so advise the jury where the testimony of the accomplice is corroborated on material points.

2. Failure to explain to the jury the expression "reasonable doubt" and to charge in the language of the law and stop at that, is not reversible error.

In the Court of Quarter Sessions of Berks County.

No. 41 September Sessions, 1918.

Trial and conviction on an indictment for false pretense.

Rule for new trial.

George Eves for defendant and rule.

Wilson S. Rothermel for commonwealth.

Opinion by Schaeffer, P. J., specially presiding, February 10, 1919.—Erwin Stoudt and the defendant were jointly indicted on the charge of false pretense. Stoudt plead guilty and was sentenced to an imprisonment of four months in the county jail. The defendant was tried and convicted at September Sessions, 1918. He has made an application for a new

trial, and in support has filed reasons stating: That the verdict is against the law; that it is contrary to the evidence; and that we erred in the admission and rejection of evidence and also failed to properly instruct the jury on the questions of reasonable doubt and the necessity of corroboration of Stoudt's, the accomplice's testimony.

At the trial of the case, no stenographer was asked for by any of the parties interested and consequently we have no record of the testimony. The evidence, as we remember it, showed that on July 18, 1918, Erwin Stoudt telephoned to A. L. Rhoads, dealer in country produce, representing himself to be one E. C. Adam, of Molltown, a merchant and customer of Rhoads, and requested said Rhoads to send three crates of eggs to the hotel at Moss and Buttonwood streets, this city, where a man by the name of Leshner would call for them. Stoudt testified that he telephoned to Rhoads from the house of Stein, the defendant. Rhoads sent the eggs, but suspecting the party who telephoned, notified City Hall, and Detective Miller followed up the eggs. Miller testified that Stoudt took the eggs from the hotel and that Stein then met the team and directed the teamster to drive around the block, instead of going directly to Stein's house. The detective arrested Stein as he was helping Stoudt and the teamster to carry the eggs into Stein's house.

Stein denied all knowledge of the transaction up to the point where he met the team with the eggs; and endeavored to explain his connection with it by saying that Stoudt represented himself as a farmer and offered to sell him (Stein) eggs. Stein said that he knew Stoudt, and that some time prior to this transaction he had some dealings with him which resulted in a dispute over a check. Stein's explanation of his connection with this case, was not believed by the jury, because it was apparent that he was not speaking the truth, when he said he thought Stoudt was a farmer, and at the same time admitted that he knew Stoudt and dealt with him before. Stoudt has been in court at different times charged with crime, and is unfavorably known in this community. The story of the defendant, that he bought the eggs from Stoudt, was so improbable in the face of the many incriminating circumstances brought out at the trial, that it is not difficult to see why the jury did not believe it.

Of the rulings at the trial, the first one complained of is the refusal of the Court to allow the defendant's counsel to cross-examine the witness Stoudt as to the location of the telephone and plan of the room, in which the same was located, after Stoudt had testified that he telephoned the order constituting the false pretense at Stein's direction and from Stein's (the defendant's) house. It is contended that the telephone mes-

sage was the only direct evidence against Stein, and that Stoudt being an accomplice, we should have allowed the widest latitude in his cross-examination for the purpose of testing his credibility, by showing that he did not know anything about the location of the telephone. The complaint is unfounded, because, if we remember correctly, Stoudt was cross-examined very thoroughly on this branch of the case, and it was only after he said that he was unable to state how many windows were in the room or at what particular place the telephone was, that we stopped the examination and stated that the exact location of the telephone was of little importance, if the jury believed that it was in Stein's house, as testified by Stoudt. Counsel persisted in asking about the rooms and windows, after Stoudt had stated that he did not remember the internal arrangement of the house, and it was then that we refused to allow the examination to go on.

The next complaint relates to the insufficiency of the charge of the Court, in not cautioning the jury, as to the danger of convicting on the accomplice's testimony without corroboration. What we said at the trial on this feature of the case, we do not recollect, but conceding for present purposes that we did not admonish the jury that it is unsafe to convict on the uncorroborated testimony of an accomplice, we think that such instructions were unnecessary, in view of the strong corroborative evidence supporting the accomplice's testimony. It is a well recognized rule that, it is the duty of the Court to admonish the jury of the danger of convicting upon the uncorroborated testimony of an accomplice, and it is the common practice of the courts to advise them not to do so: *Com. vs. Craig*, 19 Pa. Superior Ct. 94; *Com. vs. Brown*, 55 Pa. Superior Ct. 300, 310. But it will be observed that this rule requires the Court to advise the jury not to convict, when there is no corroborating testimony, or when there is no testimony which could logically be deemed corroborative. In this case, however, the facts surrounding the whole transaction, disregarding the telephone message from Stein's house, which defendant claims is the all-essential part connecting him with the case, and must be corroborated, clearly showed that Stein was a guilty party to this crime. His direction of the team with the eggs, and taking a circuitous route to reach his house, his unloading the crates at his house, not being in this business, his relations with Stoudt, who has been in trouble before, his explanation of how he became connected with the affair, were all facts, which with Stoudt's testimony, unmistakably pointed to the guilt of the defendant. Stoudt, the accomplice, was corroborated in a number of material points in his testimony, by the other witnesses, and the fact that he was not corroborated on the telephone message sent from Stein's house, does not

destroy the force and effect of the corroborative evidence in the case, because corroboration upon all material points is not necessary. If it were necessary the accomplice's testimony would be unnecessary: *Cox vs. Com.*, 125 Pa. 94.

Finally, there is alleged to have been error in the charge to the jury in failing to instruct them fully on the meaning of reasonable doubt. Again, we do not remember all that was said about this rule of law. It is admitted that we told the jury there could be no conviction of the defendant, unless they were satisfied of his guilt beyond a reasonable doubt. We explained to the juries during the week in which this case was tried, the legal significance of the term reasonable doubt, and this may have accounted for our failure, if we did fail, to enlarge on the meaning of the term in this particular case. A failure to explain to the jury the expression "reasonable doubt" and to charge in the language of the law and stop at that, is not reversible error: *Com. vs. Berney*, 262 Pa. 176.

There was ample testimony to warrant the jury in convicting the defendant, and we see no reason why the verdict of guilty should be set aside.

The rule for a new trial is discharged.

ASSIGNED ESTATE OF WILSON F. MOYER.

Assignment for the Benefit of Creditors—Distribution by Auditor—Agreement by Claimants.

Where all parties interested in a fund agree on the record before an auditor as to its distribution, the Court will order distribution to be made in accordance with such agreement.

In the Court of Common Pleas of Berks County.

Assignment Docket Vol. 4, page 216.

Exceptions to auditor's report.

D. E. Schroeder for the exceptants.

Opinion by Wagner, J., February 10, 1919.—D. E. Schroeder, Esq., as attorney for Harvey R. Moyer and William Moyer, has filed ten exceptions to the distribution made by the auditor in this assigned estate. They relate to the claims of exceptants and of Henry H. and Ella Rupp.

At the time of the assignment by Wilson F. Moyer, for the benefit of creditors, there passed into the hands of his assignee a farm stock, certain portions of which were claimed by Henry H. and Ella Rupp, and other portions by Harvey R. Moyer. To avoid delay in the settlement of the estate, it was agreed by the parties and the assignee, that the assignee be

authorized to sell the property thus claimed and that their rights be subrogated to the proceeds of the sale of the property in dispute. The auditor found that they were entitled to the property that had been claimed by them. Henry H. Rupp and Ella Rupp had also a preferred claim for rent, and Harvey R. Moyer and William Moyer each a preferred claim for wages.

At the hearing before the auditor it was realized that the fund would not be more than sufficient to take care of the respective claims of Henry H. Rupp, Ella Rupp, Harvey R. Moyer, and William Moyer. That being the case, again to avoid delay and litigation, an agreement of distribution between the parties was entered upon the record. Under the agreement, \$400 was to be distributed to Henry H. Rupp and Ella Rupp; \$100 to William Moyer, and the balance to Harvey Moyer. The fund for distribution was \$808.25. The auditor did not strictly carry out this agreement, but distributed half, \$404.12 to the Rupp, and the other half to Harvey R. Moyer and William Moyer without designating what part of the \$404.13 was to go to Harvey R. Moyer, or what part to William Moyer.

The only error we find is the failure of the auditor to distribute in accordance with the agreement, which we find to have been made as entered on the notes of testimony, at page 2. This requires us to modify the amounts to be distributed to these parties; and we, therefore, direct that there be paid to:

Henry H. Rupp and Ella Rupp.....	\$400 00
William Moyer.....	100 00
Harvey R. Moyer.....	308 25

The exceptions of Harvey R. Moyer and William Moyer, excepting in so far as they are sustained by the modified order of distribution, are dismissed.

COMMONWEALTH vs. SEIDEL.

Criminal Law—Arson—Circumstantial Evidence—Doubt of Guilt—New Trial.

After conviction on an indictment for arson, a new trial will be granted where the evidence was largely circumstantial and left doubt as to the defendant's guilt.

In the Court of Quarter Sessions of Berks County.

93 June Sessions, 1918.

Surcharge arson. Trial and verdict of guilty.

Rule for new trial and arrest of judgment.

Charles K. Derr and John M. Frame for defendant and rule.

David F. Mauger for commonwealth.

Opinion by Schaeffer, P. J., specially presiding, February 10, 1919.—Christian Seidel, the defendant, was indicted on the charge of arson. The indictment alleged that he set fire to the Leinbach Woolen Mills in the City of Reading, on March 16, 1918. A true bill was returned by the Grand Jury and the defendant was called for trial in June Sessions, on June 11, 1918, and was convicted by the jury on June 13, 1918. Counsel for defendant filed a motion for a new trial and in arrest of judgment.

The crime with which the defendant is charged is a very serious one, and one to which the law has affixed a very severe penalty. It is, therefore, important to all concerned, to feel that the verdict of guilty is a fair and logical one, under the evidence in the case. The evidence produced by the commonwealth to prove the guilt of the defendant, was largely circumstantial and of a character which left room for a good deal of doubt as to the guilt of the defendant. That the jury had considerable difficulty in disposing of this case is evidenced by the fact that the case was submitted to them at 10 o'clock A. M. and no verdict was returned until 4.30 o'clock P. M. The three judges who heard the argument in this case are of the opinion that there should be a new trial.

The motion in arrest of judgment is overruled, and the rule for a new trial is made absolute.

DEELMAN vs. SHERMAN et al.

In the Court of Common Pleas of Berks County in Equity.
No. 1186 Equity Docket, 1917.

Exceptions on behalf of plaintiffs to decision reported on page 38 et seq. of this volume, etc.

Henry Maltzberger, Samuel E. Bertolet and F. S. Livingston for plaintiff.

Cyrus G. Derr for defendants.

Opinion by Wagner, J., February 24, 1919.—Plaintiff has filed thirty-six exceptions. These relate to admissions of evidence, the Court's answers to plaintiff's requests for findings

of fact and findings of law, and to the Court's findings of fact and findings of law. They all bear upon what plaintiff contends to be the question involved:

"Can a court of equity in passing upon a covenant between A and B whereby there is imposed a building restriction upon the property of B in favor of A, construe said covenant by the conduct of persons not parties thereto with reference to other property?"

A in this case is the plaintiff. B, Spencer L. McIlvain, is the predecessor in title of defendant's property.

It is clear that the restriction imposed upon defendants' property is in pursuance of the agreement of June 6, 1914, between plaintiff and Spencer L. McIlvain. Plaintiff and Spencer L. McIlvain, in this agreement, declared the purpose thereof, that is, that the said parties "desire that the building conditions and restrictions along said Greenwich street appertaining to all the said real estate shall be the same throughout." In our former opinion we pointed out the two meanings given to this clause by the plaintiff, the one in his first bill and the other in the amended bill. We demonstrated that it was immaterial which of these we adopted in determining the meaning of the word "building," as both lead us to the same conclusion. In considering what plaintiff states to be the question involved, for the purpose of determining whether the restriction imposed by the agreement of June 6, 1914, can be construed by the conduct of parties other than plaintiff and Spencer L. McIlvain, it must be borne in mind that the restriction placed upon plaintiff's property is not a restriction of his creation, but of his predecessors in title. They are the same who, in creating the 20-foot building restriction along Greenwich street, by their acts and conduct in erecting and in permitting houses to be erected, gave the meaning to the word building. This meaning must be accepted by the plaintiff as created by the McIlvains, who, it is clear, intended it to apply to plaintiff's buildings. Since then the plaintiff contends that his agreement with Spencer L. McIlvain imposes a building restriction upon defendants' property similar to that upon his own property, it necessarily follows that in defining this building restriction thus created in the agreement, we must consider defendants' restriction in the light of the conduct of the predecessors in title to plaintiff who created the building restriction for plaintiff. That is, said covenant must be construed "by the conduct of persons not parties thereto with reference to other property."

It is not necessary to consider defendants' exceptions, as they relate to an additional view of the case taken by the defendants. We are of the opinion that the position taken by the Court to determine this case makes it unnecessary to consider this additional view.

And now, to wit, February 24, 1919, both plaintiff's and defendants' exceptions are dismissed, and counsel for defendants may prepare and submit the proper decree, sec. reg.

**ANGELICA WATER & ICE CO. vs. FARMERS' MUTUAL
FIRE INSURANCE COMPANY OF BERKS
AND LEHIGH COUNTIES.**

Insurance—Storm Insurance—Pro-Rating Loss.

Where an insurance policy covering loss by fire, storm and lightning provides that the company shall not be liable for a greater proportion of any loss on the property than the amount thereby insured bears to the whole insurance, and the property is destroyed by storm, the loss will be pro rated among companies whose policies insured the property against storm, but not among those insuring it against loss by fire alone.

In the Court of Common Pleas of Berks County.

No. 39 January Term, 1919.

Assumpsit. Rule for judgment for want of a sufficient affidavit of defence.

Snyder, Zieber & Snyder for plaintiff and rule.'

Jno. B. Stevens for defendant.

Opinion by Wagner, J., February 24, 1919.—This action is for the recovery of a sum of money alleged to be due under a policy of insurance, dated January 30, 1899, which the plaintiff held in defendant company. In the affidavit of defense all the facts alleged in plaintiff's statement are admitted. Defendant denies, however, that the full amount sued for is due under the provisions of the policy, and contends that under those contained in lines Nos. 99 to 101, inclusive, it is not liable for a greater proportion of any loss on described property than the amount thereby insured bears to the whole insurance.

The admitted facts are that the insured property was, on August 13, 1918, destroyed by a storm. At the time of the destruction, it was insured against fire in seven companies, including defendant, and against storm in only two companies, of which defendant was one. Defendant's contention is that the loss should be pro rated not between the two companies that carried the storm insurance, but between the seven companies.

At the beginning of the policy we have the clause that the company "does insure * * * against all direct loss or damage by fire, storm and lightning." When, however,

we refer to the numerous subsequent provisions, we find that they refer only to the insurance against fire. Thus we have:

"If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease."

Then again: "This company shall not be liable for losses to accounts," etc., "beyond the actual value destroyed by fire." An examination of the other provisions shows that while at the beginning of the policy it states that it is an insurance against fire, storm and lightning, the provisions relate to fire only. The policy has also attached to it a rider in the form of a storm clause, which provides:

"This policy shall cover any direct loss or damage caused by storm, not including hail, including loss or damage by cyclone or tornado, not exceeding the sum insured, to wit: \$1,166 nor the interest of the insured in the property, and subject in other respects to the terms and conditions of this policy: Provided, however, That if there shall be any other storm insurance on the property mentioned and described in this policy, this company shall be liable only pro rata with such other insurance for any direct loss by storm: And Provided, further, That the company shall not be liable for any losses or damages by storm, not amounting to five dollars, and that from all losses exceeding five dollars that amount shall be deducted.

"Attached to and forming part of Policy No. 4191, Farmers' Mutual Fire Insurance Company of Berks and Lehigh Counties.

W. P. KRUM, President.

"Attest: C. J. Rhode per J. W. R., Secretary."

It is clear, when you consider the entire policy, that the intent is to prevent more than one collection for a loss. The storm clause specifically provides: "That if there shall be any other storm insurance on the property mentioned and described in this policy, this company shall be liable only pro rata with such other insurance for any direct loss by storm." It requires no discussion to see that what was intended was that in case of storm loss, the loss should be pro rated between those policies that included the storm risk. The legal question raised by the affidavit of defense must, therefore, be determined against the defendant.

It is directed that judgment for want of a sufficient affidavit of defense be entered in this case for the amount sued for, \$1,166, less \$5 agreed upon to be deducted in the storm clause, to wit, \$1,161, with interest from December 4, 1918, a total of \$1,176.48.

AUGE vs. SCHWOYER.**Execution—Landlord and Tenant—Rent—Priority of Rent.**

Under the Act 16 June, 1836, P. L. 777, Sec. 83, a landlord is entitled to a preference for rent due at the time of the levy.

In the Court of Common Pleas of Berks County.

No. 5 April Term, 1916, E. D.

Execution. Exceptions to claim for rent.

Frank S. Livingood for the exceptant.

E. H. Deysher for the claimant.

Opinion by Wagner, J., February 24, 1919.—On March 8, 1916, the Sheriff levied upon defendant's goods under an execution issued by plaintiff against defendant. The defendant was engaged in business at 142 North Sixth street, Reading, Pa., and occupied said premises under a lease from George L. Kestner. He, on April 29, 1916, filed with the Sheriff a rent claim for \$150 for the months of February, March and April, 1916, at the rate of \$50 a month. Plaintiff has filed exceptions to this claim.

The exception to the claim for the month of February, 1916, states that the landlord had issued, prior to this execution, a distress warrant for a certain number of months, including the month of February, 1916. That under this distress warrant the property of the defendant was sold by the constable for a sufficient amount to pay what rent was then due, including the month of February. Depositions in support of this exception were taken on the part of the exceptant. L. A. Strubell testified that he had received a distress warrant from George L. Kestner for the purpose of distraining the goods on the property, 142 North Sixth street, occupied by Aaron W. Schwoyer. That in pursuance thereof he made a levy of the goods and sold them, and that the amount realized was sufficient to pay the amount of rent, labor claims, and costs. When questioned whether he made a levy for rent for the month of February, he answered he did not know, but that he had received a letter on March 10 stating that it was for that month. Referring to the letter, we find a notice from George L. Kestner to the constable that he claimed the additional sum of \$50 rent, being the rent for February, 1916, to be paid out of the proceeds of the sale of goods of Aaron R. Schwoyer, about to be sold on March 10, 1916, by the constable, under his distress warrant. George L. Kestner, the rent claimant, did not offer any evidence to contradict this. We consequently find that the rent for the month of February, 1916, was realized in the sale of March 10, 1916, upon the distress warrant issued to Constable L. A. Strubell.

The other two months for which rent is claimed are March and April. The levy by the Sheriff was made on March 8. The amount of rent to which the landlord is entitled under this execution, as a preference, is the money due at the time of taking such goods in execution—that is, at the time of the levy, namely, March 8, 1916, and not at the day of sale: Act June 16, 1836, P. L. 777, Sec. 83; *Binns vs. Hudson*, 5 Binn. 505; *Wickey vs. Eyster*, 58 Pa. 501; *Thropp's Appeal*, 70 Pa. 395; *Wadas vs. Sharp*, 27 Pa. Superior Ct. 233. The landlord is entitled, under the aforesaid cases, to rent for the month of March up to the time of the levy, a period of eight days; that is, to rent for \$13.34.

Plaintiff's exceptions to George L. Kestner's claim for rent for \$150 for the months of February, March and April are sustained, except that part of the rent due from March 1 to March 8, that is, to the amount of \$13.34.

IRWIN'S ESTATE.

Decedents' Estates—Wills—Construction—Intention of Testator—Ambiguity.

1. In the construction of a will containing apparently contradictory provisions, the Court is obliged to keep constantly in mind the testator's general intention, which, as opposed to minor or particular dispositions, must prevail.

2. The clearly expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and may justify either of two opposite interpretations. Such directions are to be so construed as to support the testator's distinctly announced main directions.

3. Where a testator made a special pecuniary legacy of \$1,000 to his daughter, Ida, indicating that that is "all" she is to receive of his estate, and then distributes the residue of his estate to nine remaining children, naming them, but in a subsequent paragraph of the will directs the sale of a property and a division of the proceeds "to the legal heirs above or mentioned in my will," the daughter Ida is limited to the legacy of \$1,000.

In the Orphans' Court of Berks County.

No. 31 February Term, 1919.

John A. Keppelman for the accountants.

Earl I. Koch for legatee.

Opinion by Schaeffer, P. J., March 4, 1919.—With respect to the distribution, Ida May Bridegam, one of testator's children, has asked the Court to interpret the will and to decide just what proportion of the estate she is entitled to thereunder.

In the fourth paragraph of the first item Ida May is given a special pecuniary legacy of \$1,000, which testator indicates

is "all" she is to receive of his estate. To the nine remaining children, all of whom are enumerated by name, he then gives in equal shares the residue of his estate; but, in a subsequent paragraph, directs the sale of a property, No. 420 Spruce street, and a division of the proceeds "to the legal heirs above or mentioned in my will." No. 420 Spruce street has been sold, the proceeds are here for distribution, and the question is whether Ida May is limited to the legacy of \$1,000, or whether, in addition, she is entitled to participate in the proceeds of 420 Spruce street, as one of the children mentioned in the will.

Time and again it has been ruled that in the construction of a will containing apparently contradictory provisions, the Court is obliged to keep constantly in mind testator's general intention, which, as opposed to minor or particular dispositions, must prevail. Citation of authority is hardly required to support this observation. As a corollary of the rule, it has also been held that "the clearly-expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and may justify either of two opposite interpretations. Such directions are to be so construed as to support the testator's distinctly announced main directions." *Sheetz's Appeal*, 82 Pa. 213; *Shaffer's Estate*, 262 Pa. 15.

What is testator's clearly-expressed purpose, to be gathered from this will? It is, we think, to divide the bulk of his estate among nine children, all of whom he enumerates by name, and to give his daughter, Ida May, no more than the special legacy of \$1,000. This purpose stands out very clearly. In the bequest to them of the "residue of the stocks and bonds," he enumerates the nine of them; so in the disposition, after the widow's death, of the "rest of my estate, real, personal and mixed," from which he excluded the Cumru township farm, and out of the proceeds of which he gave Ida May \$1,000, "all she receives from my estate;" and so also in disposing, after his wife's death, of the Cumru township farm. In all of these dispositions he mentions Ida May but once, to give her the legacy of \$1,000; but the remaining nine children he specifically enumerates three separate times as the recipients of the rest of his estate.

Had testator been content to stop at this point, where he had made a complete disposition of his estate, there would be no question about his intention. So far he has clearly indicated his intention to limit Ida May to the special legacy of \$1,000, and to divide the balance of his estate among the remaining nine children. He, however, proceeds unnecessarily to dispose of 420 Spruce street, and in so doing employs language which, if interpreted literally, would, in opposition to his clearly expressed general purpose, embrace Ida May as one of the children theretofore mentioned, and entitle her to a

share of the proceeds of the Spruce street property. This disposition, in the Court's opinion, is not controlling. It is one of the very things the rule just cited is meant to guard against in the construction of wills. For it is a direction that is ambiguous, equivocal and, in relation to what precedes it, susceptible of two opposite interpretations; and if interpreted to embrace Ida May, would, contrary to the rule, defeat testator's clearly-expressed general purpose. His purpose was to limit Ida May to a legacy of \$1,000; and he gave the balance of his estate to his remaining nine children. He says so distinctly. In the preceding dispositions, where he is dealing with his entire estate, he says that \$1,000 is "all" Ida May is to receive of his estate. The balance, after his widow's death, is to go to the remaining nine children whom he several times enumerated by name. Therefore, to give Ida May more or the remaining nine children less would be to ignore his express command. And the only ground on which to base such action is the expression in question here, which is clearly subordinate and directly opposed to testator's general purpose. To thus ignore testator's main purpose would be contrary to the rule in *Sheetz's Estate*, *supra*, and this the Court is unwilling to do.

The Court's conclusion is, therefore, that on a fair interpretation of the will, Ida May Bridegam must be limited to her legacy of \$1,000, and that the balance of the estate is distributable to testator's remaining nine children.

KLEMMER'S ESTATE.

Decedents' Estates—Devise Subject to Mortgage—Intention of Testator.

Where a father assumed an indebtedness of his son and then secured it by a mortgage on property which the father subsequently devised to the said son and a daughter, and there was nothing in the will showing the testator's intention to exonerate the devised real estate from the mortgage, the devisees take the property subject to the mortgage.

In the Orphans' Court of Berks County.

No. 55 June Term, 1918.

Exceptions to adjudication and distribution.

W. K. Stevens for exceptant.

Rothermel & Mauger, contra.

Opinion by Schaeffer, P. J., March 22, 1919.—Joseph A. Klemmer, one of the devisees of No. 948 Buttonwood street, under the will, has presented his petition, setting forth that

under the Court's opinion, filed January 18, 1919, on the exceptions, he will be compelled to pay the mortgage resting on the devised premises; that in the adjudication filed July 13, 1918, upon the account of the executors, of whom he is one, he was surcharged with \$811.25, representing balance of his indebtedness to his father, which is applicable to the payment of the mortgage in question; and praying the Court to strike off the surcharge, and amend the distribution accordingly.

The theory of petitioner is that the mortgage in question originally represented his indebtedness to a third person, which was subsequently secured by his father's mortgage on the property devised to him and his sister, Rose. His father, in other words, assumed an indebtedness of petitioner to a third person, and secured it by the mortgage in question. Originally this indebtedness amounted to \$2,000, the amount also of the original mortgage. Having thus assumed the son's indebtedness, the father looked to the son for payment. \$500 was then paid by the son to the father, which the latter credited to the son and passed on to the mortgagee, reducing the mortgage to \$1,500. Entries in testator's family book, subsequently had also been allowed as credits of the son's indebtedness to his father, until the son's debt had been reduced to \$811.25. This item then became the subject of a surcharge at the audit of the account, petitioner as one of the executors, regarding it proper to have himself charged with it. The result is, petitioner contends, that the mortgage originally having been given by testator to secure his son's debt to a third person, whatever was paid by the son to the father should have been applied to the payment of the mortgage; and since, by payments on account, as credited in the family book, and by the surcharge of \$811.25, balance due at testator's death, the son has now cancelled his debt to the father, the father's estate should pay the mortgage, and not the devisees, or the estate should, at least, allow the surcharge of \$811.25 as a credit on the amount of the mortgage. The effect of allowing such a credit, would be then to have the surcharge stricken from the adjudication.

This contention might be sound were the facts in support of it clearly established, and were the will to contain anything showing testator's intention to exonerate the real estate devised. Neither the will nor the facts, however, seem to warrant the finding prayed for. The will and the authorities applicable to its interpretation, were carefully discussed in the opinion filed January 18, 1919, on the exceptions. Nothing more need be added to what was there said, it seems to the Court, except possibly to point out that the real estate was devised not to the petitioner alone, but to him and his sister. His sister, consequently, must assume her proportionate payment

of the mortgage on the devised premises; and, taking this fact into consideration, the Court thinks it hardly likely that testator would have omitted making mention of it if he intended the payment of the mortgage by the devisees to cancel the debt of only one of them to himself. He surely could not have intended one of these devisees to contribute to the payment of the debt of the other; yet that would be the effect of granting the prayer of the petition.

As to the other allegations of petitioner, the Court thinks, to be conclusive, the facts would have to be more clearly established. The only evidence of the alleged transactions between petitioner and his father, is the family book, which was offered under objection. Even if admissible for the purpose offered, it is practically valueless as evidence. The book has not been proved; and the Court must frankly confess its inability to understand the entries. They are, it is admitted, not all in testator's handwriting; some of them appear to be in the handwriting of the petitioner; and what entries do appear, are not intelligible to the Court. As evidence, therefore, to support the theory of the petition as to their relation to the mortgage in question, they are far from conclusive.

In this state of the case, the Court sees no reason for granting the prayer of the petitioner. To do so, as decided in the opinion on the exceptions, we should have to ignore testator's plain intention respecting the payment of this mortgage. To warrant such action, the exact purport of the entries in the family book, conceding that they do represent transactions of some kind between testator and Joseph Klemmer, is not sufficiently clear. In the Court's opinion, therefore, petitioner's evidence fails to support his contention, as to the payment of the mortgage in question; and his prayer to have the surcharge of \$811.25 stricken out of the adjudication of July 13, 1918, must be denied.

The petition is dismissed; and the adjudication and distribution filed July 13, 1918, is confirmed absolutely.

DETURCK'S ESTATE.

Appeals—Costs—Printing Paper Book—Counsel Fee—Bond Premium—Act 15 April, 1907, P. L. 83.

1. Where one in the capacity of an heir unsuccessfully appeals to the Superior Court from the distribution ordered by the Orphans' Court, and the upper Court decrees that the costs of the appeal be paid out of the fund for distribution, the costs do not include the cost of the appellant's paper book, the premium on the bond or appellant's counsel fees.

2. Under the Act 15 April, 1907, P. L. 83, the party who loses the final decision is not entitled to charge and collect as part of the costs, the amount he expended for printing his paper book, for bond premium and for counsel fees.

In the Orphans' Court of Berks County.

Petition for modification of decree.

Ralph H. Mengel and W. K. Stevens for the petitioner.

Opinion by Schaeffer, P. J., March 22, 1919.—On June 3, 1916, this Court filed an adjudication and distribution upon the account of the petitioner, as surviving administrator of this decedent's estate. From the distribution so made, petitioner appealed to the Superior Court, and was unsuccessful, the higher Court having affirmed this Court, and dismissed the appeal, "at the costs of the appellant." Subsequently, on January 3, 1919, the Superior Court further directed that "the decree of this Court is modified so that the same shall read 'the decree of the Court below is affirmed, and it is ordered that the costs of this appeal be paid out of the fund for distribution, and the Court below is directed to modify the schedule of distribution accordingly.'" As a result of this decree of modification, the petitioner is before the Court, praying for a modification of the distribution of June 3, 1916, so as to embrace payment of his costs, which are set forth in the petition as follows:

Prothonotary, Supreme Court, appeal...	\$ 12 00
Register of Wills.....	32 05
Cora C. Mays, service.....	1 00
Mary A. Kehr, service.....	1 00
Petitioner's paper book.....	144 25
Premium on hand.....	35 00
Counsel fees.....	150 00
Total	\$375 30

All of these items are objected to as improper subjects of cost, under the decree of the Superior Court, except the first four. The question is, therefore, whether under the decree of the higher Court, petitioner is entitled to be reimbursed for the cost of his paper book, premium paid for bond given to secure payment of costs, and for counsel fees, a total of \$329.25:

In deciding the question, the Court is bound to keep in mind that petitioner was allowed his appeal, not as administrator of decedent's estate, but as an heir. As administrator, Ezra K. DeTurck had no standing to appeal from the decree of distribution, and was entitled to be heard only as an heir. It is not the case, consequently, of an administrator defending his estate against litigation, but of an heir appealing from a decree of distribution with which he was dissatisfied.

As to what the petitioner is entitled to by way of costs, under the decree for modification of distribution, we think is clearly decided in Knoller's Appeal, 65 Supr. Ct., 169. For the Court there said: "When this Court made the order as to costs,

the costs included only such as were legally chargeable. As the Act of 1907 only allows the charging of the paper book against the unsuccessful suitor at the end of the suit, and as the plaintiff in the suit before us was the successful suitor, we have no authority to direct him to pay the costs of the paper book. We are bound by the terms of the Act of 1907, *supra*, and we have no power to extend its terms or vary its provisions. The ultimate winner of the suit is the one entitled to its benefits."

The petitioner here was unsuccessful in his appeal to the Superior Court, and while, by the decree of modification, he is now entitled to costs, the Court itself has made it very clear in the language quoted, that these costs must be kept within certain well defined limits. The cost of the paper book would not come within those limits. The Court so says specifically; and if the cost of the paper book is excluded, so also must be the premium on the bond, and, of course, the counsel fees. None of these comes within the items of legal costs fixed by the Acts of Assembly relating to the subject; and since the Court making the decree for costs has itself limited the allowance to legal costs, the three items objected to cannot be allowed. The remaining four items, amounting to \$44.05, are allowed; and the distribution will accordingly be amended to include them.

Since the distribution in question, \$79.24, interest on the fund, has accrued and has been placed to accountant's credit. It will be the subject of a surcharge.

Balance for distribution as appears by ad-

judication filed June 3, 1916.....	\$1,481 18
Amount of surcharge.....	79 24
	—————\$1,560 42

DISTRIBUTION.

To James W. Wertz, Esq., Adj., costs.....	\$ 4 00
To petitioner's costs, as follows:	
Prothonotary, Supreme Court.....	12 00
Register of Wills.....	35 05
Cora C. Mays.....	1 00
Mary A. Kehr.....	1 00
	—————\$ 53 05
	—————\$1,507 37

To Alice K., Daniel H. and Raymond H.

DeTurck, executors of Abraham K.

DeTurck, deceased\$1,507 37

The petition, etc., are hereto attached : AND IT IS ORDERED AND DECREED that Ezra K. DeTurck, surviving administrator as aforesaid, do pay the distributions to the persons respectively entitled thereto.

MIDDLEBY'S ESTATE.**Orphans' Court—Practice—Counsel Fees.**

1. Where counsel were largely responsible for surcharging the executors of an estate for approximately \$48,000, a counsel fee of \$2,000 is reasonable and will be allowed under the equitable principle, that having been responsible for the production of the fund, counsel are entitled to be paid out of it.

2. In an account of an ancillary administrator, where the settlement of the estate aggregated \$75,000 and covered a period of about seven years; where the time and labor involved were above the ordinary legal services incident to the settlement of the estate; where it appeared that important litigation was pressed to a successful conclusion and realized a fund of more than \$30,000 for payment to creditors; where part of the fees charged depended for payment largely upon the successful outcome of the litigation; and where the uncontradicted testimony of leading members of the Bar upheld the fairness of the charge, an exception to a counsel fee of \$9,000 will be dismissed.

In the Orphans' Court of Berks County.

No. 71 June Term, 1918.

Exceptions to the account.

Fred A. Marx for the exceptant.

Snyder, Zieber & Snyder for claimants.

W. Kerper Stevens and W. B. Bechtel for the accountant.

Opinion by Schaeffer, P. J., April 1, 1919.—Exceptions to the accountant have been filed by Robert M. Bowen, domiciliary administrator, complaining that counsel fees and accountant's compensation are excessive. Exceptant also objects to a claim of \$2,000, presented at the audit by Messrs. Snyder, Zieber & Snyder, for services at the settlement of the account of the original executors. Both claim and credits excepted to, because of the connection between them, can be treated together. The claim goes back to the former proceedings in this estate, upon which also rest the counsel fees excepted to; and since claim and fees thus bear a certain relation to each other, they need not be separated in this discussion.

In considering them, it may be well to review briefly the history of this case. The decedent died on May 20, 1911, domiciled in Massachusetts. At the time of his death, he was engaged in manufacturing automobiles in this city. That his success in this business was very indifferent became clear at his death from the very unsatisfactory condition of his affairs. Nevertheless, under power conferred by the will, the business was continued by the ancillary executors, McCarthy and Gherst, both inexperienced in the manufacture of automobiles; and after some months of operation, during which dissension developed between the executors, they showed a loss to the estate of approximately \$48,000. With this loss, the Court, in an adjudication filed June 24, 1914, on the account of Gherst,

accountant, surcharged both executors; and this adjudication of the Court was never appealed from. The surcharge was not paid by the executors. Gherst, who was insolvent, subsequently died; McCarthy never came within the jurisdiction of the Court.

In this state of the case, The Colonial Trust Company, accountant here, became administrator, d. b. n. c. t. a.; and it was discovered that when the will was probated and ancillary letters testamentary were granted to the executors named in the will, the Register of Wills of this county had failed to exact a bond as required by the Act of March 15, 1832. Suit to recover the amount of the bond was then instituted against the Register's bondsmen, judgment for \$30,000 in favor of accountant, was recovered; and on appeal to the Supreme Court, see *Commonwealth to use vs. Gregory et al.*, 261 Pa. 106, that judgment was affirmed. It is the amount of this judgment that went largely to make up the devastavit of the original ancillary executors; and to that extent is responsible for the size of the fund embraced in the account before the Court.

From the foregoing recital, it is clear that the counsel fees, both those claimed as credits in the account and those claimed by Messrs. Snyder, Zieber & Snyder, are based upon no ordinary legal services, and bear a certain relation to each other. Snyder, Zieber & Snyder, in the first place, were largely responsible for the surcharge of the original executors with the amount of their devastavit; and counsel for the accountant here were responsible for the collection of the larger part of it. Without proof of the devastavit, in other words, there could have been no surcharge, in the first place; and without the recovery of \$30,000 on the Register's official bond, there would have been no money to pay to the greater part of the surcharge, in the second place. Both counsel, therefore, are now claiming compensation out of the fund, under the recognized equitable principal, that having been responsible for the production of the greater part of the fund, they are now entitled to be paid out of it.

As to the value of the services of Messrs. Snyder, Zieber & Snyder, in securing the surcharge of \$47,987.98, in the original adjudication, the Court thinks the testimony of its predecessor must be given full weight. Robert Grey Bushong, Esq., as the presiding president judge of this Court, heard all the proceedings out of which grew the surcharge, and himself wrote the adjudication in which the surcharge was made. No one, consequently, is in better position to express an opinion of the value of the legal services performed by claimants. Testifying at the hearing on these exceptions, he said that Mr. Jefferson Snyder, of the claimant firm, was "the attorney in court that really handled the laboring oar in presenting the

testimony and obtaining the surcharge," and that "the service is worth at least what you (Mr. Snyder) claim—\$2,000, at least that." The writer, who has gone over the record of those proceedings, is not willing to say that the former president judge of this Court is wrong, in the expression of that opinion; and the fee of \$2,000 to Messrs. Snyder, Zieber & Snyder, is allowed.

With respect to the counsel fees in the account, the Court is bound to consider several phases of this case. First of all, the services were rendered to the administrator of an estate, and the time and labor required over and above ordinary legal services incident to the settlement of an estate, are, therefore, to be taken into account; second, litigation having been carried on in the settlement, the novelty and difficulty of any legal questions involved, are to be considered; third, were the counsel fees in any wise dependent upon the contingency of success in the litigation which arose; and fourth, what have been the customary charges of the bar for similar services? These, it seems to the Court, are the principal elements which should enter into the discussion of the question as to whether or not these credits for counsel fees should be sustained.

The first account of Gherst, ancillary executor, was filed in this Court July 27, 1912. Since then, covering a period of nearly seven years, this estate, on some question or other, has been before the Court. In the early stages of the proceedings, their complicated nature became apparent. Then already, the ancillary executors were at odds with each other; it was evident that their course of conduct had proved disastrous to the interests of the estate, and there were hundreds of creditors before the Court seeking payment of their claims. In these circumstances, the efforts of creditors and of the widow were directed toward replenishing the wasted assets of this estate. Numerous hearings were had, in which, among others, as testified by this Court's former president judge, both Messrs. Snyder, Zieber & Snyder, representing the widow, and Messrs. Stevens & Bechtel, representing creditors, appeared and took part, and these hearings culminated in the adjudication of June 27, 1914, and the surcharge of the ancillary executors already mentioned.

From this adjudication several appeals to the Supreme Court were taken by creditors and disposed of (see *Middleby's Estate*, 242 Pa. 39; 249 Pa. 203 and 254 Pa. 328) and suit on the official bond of the Register of Wills of this county was finally begun in the Court of Common Pleas of this county. This suit was the first direct effort to realize on the surcharge in the adjudication of June 27, 1914. Gherst, accounting ancillary executor, had turned out insolvent and died some time after; McCarthy stayed outside the jurisdiction of the Court. From

neither, consequently, was the collection of the surcharge deemed possible; and it was then that recourse was had to a suit against the official bondsmen of the register, who, it was found, had failed to exact the necessary bond from the ancillary executors. That these final proceedings were instituted and prosecuted to a successful conclusion by accountant's counsel alone, is undisputed in this case (see *Com. to use vs. Gregory et al.*, 261 Pa. 106). That the legal services thus involved in the settlement of the estate were not of an ordinary character, is also not disputed.

The value of the services rendered by accountant's counsel and the nature of the litigation involved in the suit of the register's official bond fully appear in the record of that case. Being reported in *Com. to use vs. Gregory et al.*, 10 Berks County Law Journal, 137, and also on appeal to the Supreme Court, in 261 Pa. 106, it requires no recapitulation here. Sufficient to say, that it was closely contested at every step; and the Court is not prepared to disagree with accountant's counsel that it presented novel and difficult questions of law in Pennsylvania. On the contrary, their contention seems justified by the well considered opinion of Judge Wagner, discharging rules for new trial of the cause, in the Court of Common Pleas, reported in our law journal, and, on appeal to the Supreme Court (see 261 Pa. 106) by the comprehensive opinion of Justice Von Moschzisker, who, in the course of which, took occasion to observe that "defendants raise a number of interesting issues of law." It is apparent, therefore, that the legal services involved in the case were, to say the least, important, and the results obtained considerable. For, after all, one cannot avoid the fact that as a result of this litigation something over \$30,000 has been added to this fund, and is now available for claims of creditors.

In connection with these facts, the fairness of the counsel fees in the account is to be judged in the light of the testimony submitted, first, as to the element of contingency which entered into their payment, and, second, as to the opinion of other members of the bar of what is customary under the circumstances. William B. Bechtel, Esq., testifying at the hearing on the exceptions, said an understanding existed between accountant and its counsel that no counsel fees were to be paid, in the event of failure to recover on the register's official bond. No written contract between them was made, because of Mr. Bechtel's opinion that accountant could make no such contract legally; but there undoubtedly is something in his observation that had they failed to realize the fund, there would have been no money here to pay counsel. On the successful outcome of the suit, therefore, the payment of counsel fees, it seems to the Court, depended, at least, to some extent;

and in view of the fact that nothing, so far as the record shows, was offered to dispute this position of accountant's counsel, the Court is hardly in position to ignore it.

What, then, is customarily charged by lawyers for legal services of the nature and character involved in this case, has been testified to by leading members of the bar. John B. Stevens, Esq., said he "would regard a fee of 25 per cent. as not at all out of the ordinary." Harry F. Kantner, Esq., thought "25 per cent. of the amount recovered would be a fair charge." And Cyrus G. Derr, Esq., where "an arrangement is contingent," fixed "anywhere from 25 per cent. to 33 per cent." These witnesses are prominent in legal circles, and all have wide experience in the practice of the law. Nothing in contradiction of their opinions appears in the record; and how, consequently, the Court can ignore their opinions, does not appear.

Thus, the case stands about as follows: Exception is taken to counsel fees of \$9,000 in an account of an ancillary administrator, where the settlement of the estate aggregating here about \$75,000 has covered a period of all but seven years, and where, it is not disputed, time and labor were involved above the ordinary legal services incident to the settlement of estate; where it appears that important litigation was pressed to a successful conclusion and realized a fund of more than \$30,000 for payment to creditors; where part of the fees charged, it is not disputed, depended for payment largely upon the successful outcome of the litigation; and where the uncontradicted testimony of leading members of the bar is that the charges made are the fair, customary fees of legal counsel for the services rendered. In view of these facts, there remains, it seems to the Court, only one course to pursue. The exceptions to counsel fees must be, and accordingly are dismissed; and the credits are allowed to stand.

The remaining exception is to the accountant's compensation of \$2,300.33. In disposing of it the Court thinks it necessary to say only, that accountant had in its hands something like \$60,000 in cash; and the Supreme Court has ruled that for the responsibility alone of handling a fund, an accountant may, as a convenient method of arriving at compensation, calculate 2½ per cent.: *Stevenson's Estate*, 4 Whar. 104. Above that, he is to be governed by the time and labor involved in the settlement of the account. Adopting this method, the Court finds that for responsibility in handling the fund, accountant would be entitled to charge at least \$1,500. Above that, it seems to the Court, the charge in the account is moderate. It amounts to slightly more than one per cent., and accountant must have put in some time and labor in the settlement of the account. It was, therefore, entitled to charge something; and in the opinion of the Court has not charged too much. The excep-

tion to accountant's compensation, consequently, is dismissed, and that credit also permitted to stand.

With respect to the distribution of the fund, after the payment of the preferred claims, it is to be noted that there are two classes of common creditors—foreign and domestic. In these circumstances, the question of the solvency or insolvency of the estate has been raised, in order to decide whether distribution to both classes of creditors should be made at this time. Were the solvency of the estate established, only the Pennsylvania creditors would be entitled to payment, and the balance of the fund would be remitted to the domiciliary administrator; but if the estate is insolvent, in order to insure equality of treatment of all creditors, both classes would be entitled to participate.

It is difficult to say for a certainty whether the estate is solvent or not. Counsel for the ancillary administrator, accountant here, have stated that the assets of the estate are insufficient to pay the claims in full; the domiciliary administrator, on the other hand, in a written statement to the Court and verbally, on the witness stand, first expressed the opinion that the estate would pay in full. Later on, he appears to have become uncertain of the exact extent of the estate's assets, for his counsel here has stated frankly that he does not know whether or not the estate is solvent, and expressed a fear that if Pennsylvania creditors were paid in full, foreign creditors might suffer inequality. The impression gathered by the Court is, therefore, that all parties are satisfied to have the fund distributed ratably to all classes of creditors, and accordingly distribution will be so made. In the meantime, so much of the distribution made by this Court on June 27, 1914, as relates to the payment of Pennsylvania creditors, and which, owing to the various issues arising in this case, has been suspended, is now set aside to make room for the distribution now to be made.

Against the claims of John R. Graham and Katharine Middleby there appear to be adverse proceedings pending in the domiciliary forum. The exact nature of these proceedings does not appear in the record here; but the domiciliary administrator has asked that "under no circumstances should any money" be paid to them. Distribution to these claimants for the present, therefore, will go no further than to impound the sums distributed on account of their claims in the hands of the accountant here until the right of claimants to receive them has been satisfactorily established.

COMMONWEALTH vs. EISENBISE.

Criminal Law—Embezzlement—Unincorporated Beneficial Associations—Embezzlement of Funds Acquired by Illegal Practices—Evidence—Nol. Pros.—Re-indictment.

1. The treasury of an unincorporated beneficial association who receives and wilfully appropriates its funds to his own use is guilty of embezzlement even though he is a member of the association. In such a case the defendant cannot be heard to say that the association acquired some of the embezzled funds from illegal practices.

2. A nol. pros. does not operate as an acquittal nor stand in the way of a re-indictment.

In the Court of Quarter Sessions of Berks County.

No. 147 June Sessions, 1918.

Surcharge embezzlement. Trial and verdict of guilty.

Rule for new trial.

Stephen Meredith for defendant and rule.

A. H. Rothermel, contra.

Opinion by Endlich, P. J., March 10, 1919.—The indictment in this case charges that the defendant, in the employ of the Northwestern Beneficial Association as its treasurer, received in its name and on its account various sums of money aggregating about \$915, and feloniously embezzled the same, and that, being its bailee of said sum of money, the property of the Northwestern Beneficial Association, he feloniously took the same and converted it to his own use. At the trial there was no dispute as to any material facts under the evidence. The result was a conviction, and the defendant is now asking for a new trial.

1. The Northwestern Beneficial Association is an unincorporated society, and it is contended that the defendant, being a member of it, had a partnership interest in the money in question, and therefore, under the doctrine of such cases as *Krause vs. Com.*, 93 Pa. 418, could not be guilty of embezzlement with respect to it. The Act 20 June, 1883, P. L. 132, declaring the funds of unincorporated associations for benevolent, charitable or beneficial purposes to be trust property, not to be diverted from the original purpose and not to be distributed to members on dissolution, does not support his claim of part ownership. Neither do the decisions in *Com. vs. Volz*, 14 W. N. 289, and *Com. vs. Vaurzin*, 45 Pa. C. C. Rep. 58. (See also opinion filed May 6, 1907, in *Brunner's Heirs vs. L. & I. Co.*, C. P. Berks Co., No. 924 Equity Dock. 1906, and decisions there cited). In *Com. vs. Volz*, supra, Judge Arnold said of the defendant in that case, also treasurer of an unincorporated society—

“He was employed by the lodge as treasurer, and was in that respect a servant of the lodge subject to its order, as much

as a stranger would be. That he is a member is no reason why he should retain any part of the money. It is a strain upon the law to hold him to be entitled, as a partner, to retain the money received and drive the association to a bill for an account. The country is full of these societies, doing much good * * * and it is essential that the relief they afford should come promptly, and not be delayed by suits as between partners. * * * These associations are entitled to the protection of the criminal law against pillage by their officers."

At the trial it was sought to fortify the contention just spoken of with proof that the Northwestern Beneficial Association was in the habit of selling to its members and possibly others intoxicating and other liquors, and that the money alleged to have been embezzled by the defendant, and a great deal more, was derived from these practices. The offer was excluded, and upon reflection it seems properly so. The whole of this matter is comprehended by the broad principle applied in *Shinn vs. Com.*, 32 Gratt. (Va.) 899. There the secretary of a building association was indicted for embezzling its funds. Among other defences he undertook to show that the association was not organized in accordance and conformity with the requirements of the statute, and was therefore operating illegally and without charter rights. But he was not permitted to do so. Having, as secretary of the association, received and wilfully appropriated its funds or property, it was held that he could not be heard, in a criminal prosecution therefor, to contradict its legal existence. So here, the defendant accepted employment from the Northwestern Beneficial Association as its treasurer, gave bond for the proper performance of his duties as such, and received the moneys coming to him as treasurer as the property of the association and misappropriated the same. Under these circumstances it is surely not going too far to say that he is debarred from questioning the society's ownership of the funds embezzled by him, as distinguished from something owned by him in common with the rest of its membership.

2. It was further offered to be proved by the defendant at the trial that there had been a previous prosecution by the society against the defendant for the misappropriation of this particular sum of money, that there was a settlement of the society's claim and payment of the defendant's bond by the bonding company, and that thereupon a nol. pros. was entered by the district attorney, the present prosecution being brought subsequently at the instance of the bonding company. This offer also was rejected. Cases of embezzlement like this one are not within the authorization of settlement in sec. 9, Act 31 March, 1860, P. L. 432; *Pearce vs. Wilson*, 111 Pa. 14; (and see *Geier vs. Shade*, 109 id. 180). Moreover, if they were

within that enactment the settlement would, as pointed out in *Com. vs. Shultz*, 2 Berks Co. L. J. 47, have to conform to the method and mode of authentication indicated in the statute in order to give it any validity or binding effect, which is not offered to be shown here. All we have is the entry of the nol. pros.; and it is familiar law in Pennsylvania, at least as old as *Agnew vs. Com'rs*, 12 S. & R. 94, 96, that a nol. pros. does not operate as an acquittal nor stand in the way of a re-indictment.

Upon a careful review of this record, the inevitable conclusion seems to be that the application for a new trial cannot properly be granted nor the verdict interfered with, and therefore—

The rule to show cause is discharged.

SHIRK vs. DIRECTORS OF THE POOR ET AL.

Constitutional Law—Public Officer—Poor Director—Increase of Salary During Term—Acts 3 May, 1909, P. L. 382 and 24 May, 1917, P. L. 293—Section 13, Article III of the Constitution.

A poor director of Berks County elected under the provisions of the Act 3 May, 1909, P. L. 382, is a public officer within the meaning of Section 13, Article III, of the Constitution, and is thereby deprived of the right to receive an increase of salary under the Act 24 May, 1917, P. L. 293.

In the Court of Common Pleas of Berks County.

No. 99 October Term, 1918.

J. H. Jacobs for plaintiff.

W. E. Sharman for defendants.

Opinion by Endlich, P. J., March 10, 1919.—From the first Monday of January, 1914, to the first Monday of January, 1918, the plaintiff was one of the Poor Directors of Berks county, duly elected to the office in November, 1913. At the time of his election and assumption of the office, the Act 3 May, 1909, P. L. 382, which was understood to be applicable, fixed the salary of County Poor Directors at the sum of \$1,000 per year. The Act 24 May, 1917, P. L. 293, undertook to increase the pay of such officers in the class of counties to which Berks county belonged to \$1,500 per year. The plaintiff continued to be paid at the rate of \$1,000 per year, his demand for the increase being refused by the Controller. This action is brought to recover the alleged arrearages in plaintiff's salary by reason of that refusal.

A case having been stated for the opinion of the Court, the same was argued and decided in favor of the plaintiff. In the argument and decision, however, both counsel and Court

overlooked the case of *Com. vs. Moffitt*, 238 Pa. 255. That case is as nearly on all fours with the present one as can be, and rules the question here presented squarely and directly in favor of the defendants, under Art. III, sec. 13 of the Constitution, which forbids the increase of salaries of public officers after their election or appointment, and is held to apply to Poor Directors constituted under a special Act of Assembly as in this county. A re-argument was promptly ordered and heard. All that remains now to be done is to dispose of this case as the Supreme Court's ruling in the one above cited requires us to do, to wit, in favor of the defendants.

And now, March 10, 1919, the opinion filed in this case on Jan. 25, 1919, is recalled and withdrawn from the files, the order directing the entry of judgment for plaintiff is vacated and set aside, and it is now ordered that judgment be entered upon the case stated in favor of the defendants.

KELLER vs. COMMERCIAL TRUST COMPANY, Guardian of WATSON L. HOCH.

Guardians—Weak-Minded Persons—Act 28 April, 1907, P. L. 292—Act 13 June, 1836, P. L. 597—Support and Maintenance—Implied Contract—Necessity of Support.

1. The guardian of a weak-minded person has, by virtue of section 6 of the Act 28 April, 1907, P. L. 292, the same powers and duties as a committee on lunacy.

2. Sections 20 and 21 of the Act 13 June, 1836, P. L. 597, make it the duty of the guardian of a weak-minded person to apply the income of such person's estate towards his support and maintenance, and if the income is not sufficient, to petition the Court for leave to apply so much of the principal as is necessary.

3. Where a person furnishing board to a weak-minded person notifies the legal guardian of such person to remove its ward or pay board for the ward, and the guardian fails to take him away, such failure constitutes an implied contract that the guardian will pay for the ward's support and maintenance.

4. In the absence of a contract, express or implied, the extreme necessity for providing for the wants of a weak-minded person may, under special circumstances, entitle one who voluntarily cares for such person to payment out of his estate.

In the Court of Common Pleas of Berks County.

No. 102 November Term, 1916.

Assumpsit. Trial and verdict for plaintiff for \$244.95.

Rules for new trial and judgment n. o. v.

Charles H. Tyson, Thomas K. Leidy for defendant and rules.

Randolph Stauffer, contra.

Opinion by Wagner, J., April 7, 1919.—The issue that was presented to the jury in this action was:

"Is the Commercial Trust Company, of Reading, Pa., guardian of Watson L. Hoch, a weak-minded person, indebted to Charles Keller for the board, lodging and washing furnished by said Charles Keller to said Watson L. Hoch for 46 weeks, from January 16, 1917, and, if so, for what amount?"

The jury gave an affirmative answer to the first interrogatory, and as to the amount of indebtedness, found in favor of the plaintiff for \$244.95.

On January 16, 1917, Watson L. Hoch was declared by this Court a weak-minded person and the Commercial Trust Company was appointed his guardian. "The guardian, so appointed, shall have precisely the same powers, and be subject to the same duties, as a committee on lunacy in the State of Pennsylvania:" Act 28 April, 1907, P. L. 292, Section 6. "The committee of the estate of every person found to be a lunatic . . . shall have the management of the real and personal estate of such person, and shall from time to time, apply so much of the income thereof as shall be necessary to . . . the support and maintenance of such person. . . . If the income of the estate of such person shall not be sufficient for the purpose aforesaid, it shall be lawful for the committee aforesaid, under the directions of the Court, to apply so much of the principal of the personal estate as shall be necessary for the purpose:" Act 13 June, 1836, Sections 20 and 21, P. L. 597. The duty of the guardian was therefore to apply the income of the estate of this weak-minded person towards his support and maintenance, and if the income was not sufficient to petition the Court for leave to apply so much of the principal as was necessary. The guardian has on hand \$2,300. "As soon as sufficient funds came into his hands, it was the plain duty of the guardian, to assume the support and maintenance of the lunatic:" *Arnold's Estate*, 253 Pa. 517, at pp. 519, 520.

Watson L. Hoch came to the home of the plaintiff some time in September, 1916, and engaged board for himself and continued to reside there until he was adjudged a weak-minded person. Since then he has continued to live with plaintiff. He was furnished his meals and a room. His room and washing were taken care of by plaintiff's wife. There is no question but that his necessities were well-provided for by the plaintiff.

One of the defenses was that the guardian was not indebted to the plaintiff by reason of the fact that on January 31, 1917, it wrote a letter to the plaintiff in which it stated that it had concluded that nothing could be paid to him for Watson L. Hoch's support because his father was desirous of having him home and offered to support him. The letter

stated: "You are therefore informed that anything you do for Watson L. Hoch will be without compensation." It is upon this ground that defendant asks for judgment n. o. v.

The evidence on the part of the plaintiff was that a person had been sent to his home by the guardian. His testimony on this point is (N. of T., p. 6):

"Q. You say they sent a man out there? A. Yes, sir.

Q. What did you ask them? A. He came there and I told him, 'What are you going to do now?' 'Why,' he said, 'I don't know.' I told him to take him away or if they can't they should pay board for this man.

Q. What did he say? A. Who? This man?

Q. Yes, sir. A. He tried to take him away. He said, 'I see this man don't do any good here, because this man don't look as if he could work.'"

He further testified that Hoch refused to leave the place. He said that he twice notified the guardian to come and take Hoch away, and once wrote a letter asking the guardian to take him away. H. Robert Mays, who had been attorney for Hoch prior to the time that he was declared weak-minded, testified as follows (N. of T., page 16):

"A. At the request of an officer of the Trust Company, and at the request of Mr. Tyson, I saw Mr. Hoch and tried to prevail on him to return to his father's home in Blandon; but he said he would not go back, that he had had nothing at home like this in all his life, they never treated him well at his home, and he would not go back. I tried to induce him further to go, but he simply said he would not, under any circumstances, go back. . . . That was a few weeks after the time that the Court made an order declaring him to be feeble-minded."

None of this evidence was denied by the defendant. The time of the writing of this letter sent by plaintiff to defendant was admitted by Mr. Tyson, one of counsel for defendant, to be a month or so after the appointment of a guardian. (N. of T., page 7). Nothing further was done by the guardian for the purpose of taking this weak-minded person away from the place where he was being properly supported and maintained by plaintiff. Neither did the father come for him or do anything to get his weak-minded son back to his home. It was testified by plaintiff that he did nothing to prevent Watson L. Hoch from leaving his place. There is no evidence in the case to show that plaintiff did anything to persuade him to remain. We have, therefore, the guardian, whose positive duty it was to maintain and support this weak-minded person, doing nothing further and leaving its ward with plaintiff after plaintiff informed the guardian that if it did not take the ward away the plaintiff wanted to have his board paid. It certainly was

not incumbent upon the plaintiff to set this person, who had been declared by the Court to be weak-minded and irresponsible, out upon the street.

We consider that in view of the notice by the plaintiff to the guardian that the ward should be taken away, otherwise it should pay his board, and the failure by the guardian to take him away, constitutes an implied contract between the guardian and the plaintiff that the guardian would pay during the time that he remained there, the value of his maintenance and support. Even if we do not have an implied contract we are of the opinion that the extreme necessity, under the facts of this case, to supply the wants of Watson L. Hoch are such that plaintiff can recover, notwithstanding the fact that he received a letter from the guardian that it would not pay him. In *Bredin vs. Dwen*, 2 Watts 95, on page 102, we have: "Nothing would justify such an interference, but a case of extreme necessity, founded on a neglect of the guardian's duty; the proof of which, however, rests on the claimant of compensation." In *Arnold's Estate*, supra, at page 520, it is stated: "The general proposition that the law implies an obligation on the part of a lunatic or his estate to reimburse those who have supplied his necessities, cannot be questioned." We do not consider that we can enter judgment n. o. v. for defendant.

The second question to be determined was how much the defendant was indebted to the plaintiff. This matter was clearly for the jury. It was admitted that the services rendered were worth \$7 a week (N. of T., pp. 13, 14). The defendant, however, contended that the value of the services of the weak-minded person was sufficient to compensate the plaintiff; that is, that Watson L. Hoch's services were worth at least \$7 a week.

The plaintiff, his wife, Robert B. Keller and Charles Keim, a man working on the farm as the hired man, testified as to the work done by Hoch. For the purpose of showing the work done by him the defendant called as witnesses Larry Kline, who had formerly lived upon the plaintiff's farm as hired man, Jacob Forney, who lived on an adjoining farm, his son, Reuben Forney, and H. A. Levan, who operated the creamery to which plaintiff sent his milk. Kline was the only witness who testified that he considered the services rendered by Hoch were equal to the value of his board and maintenance. Jacob Forney stated that while he saw him working at times, he could not say what the value of the services was. Reuben Forney also could not testify to the value of the services. H. A. Levan stated that Watson L. Hoch sometimes brought the Keller milk to the creamery, but that this was not very often. The jury in their verdict allowed \$2 a week for Hoch's services.

The verdict rendered was on a basis of plaintiff being entitled to a claim of \$5 a week.

Rules for new trial and judgment n. o. v. are discharged.

CLAPPIER vs. FISHER.

Wills—Latent Ambiguity—Parol Evidence—Misdescription of Real Estate.

Where testator in making a devise misdescribes a piece of real estate, a latent ambiguity may arise making parol evidence admissible for the purpose of removing the ambiguity and giving effect to the will. Thus, where a testator devises a property described as No. 245 North Fourth street, and it appears that no such property ever existed or was owned by the testator, but that the only property owned by the testator was No. 245 North Front street, the devisee takes title to the last mentioned property.

In the Court of Common Pleas of Berks County.

No. 81 June Term, 1918.

Assumpsit: Trial and verdict for plaintiff for \$2,700.

Rule for judgment n. o. v.

E. H. Deysher for defendant and rule.

Wm. J. Young, contra.

Opinion by Wagner, J., April 7, 1919.—Plaintiff brought suit against the defendant to recover \$2,700 balance claimed to be due upon a written agreement entered into between plaintiff and defendant, wherein defendant agreed to purchase from plaintiff for the sum of \$2,750:

"All that certain two-story brick dwelling house, and lot of ground on which the same is erected, situate on the east side of North Front Street, between Walnut and Elm Streets, being No. 245, Reading, Pa., containing in front 15 feet, and in depth 110 feet."

Defendant defends upon the ground that plaintiff does not have title to said property in that the description in the will of William Hallbauer, under which will plaintiff claims title, describes the property bequeathed to the plaintiff, as follows:

"ITEM: I give and bequeath unto my Housekeeper Wilhelmina Clappier of Minersville State and County as above as Compensation for her services and care my House and Lot No. 245 North Fourth Street in the City of Reading this State."

That is, defendant defends upon the ground that this will describes the property demised as on North Fourth Street and

does not give title to the plaintiff to the property situated on North Front Street.

All the facts in this case are admitted. The will is dated May 15, 1895. William Hallbauer, testator, died October 11, 1895. The plaintiff took possession and moved into 245 North Front Street within a year after testator's death and continued to live there until the time that she entered into the agreement to sell the property to defendant.

It is clear from the will that William Hallbauer intended to convey to the plaintiff his house and lot located in the city of Reading. When an attempt was made to carry his bequest into execution it failed for the reason that the testator did not have title to 245 North Fourth street. In addition, there was no such property in existence. That is, 245 North Fourth street (the subject) did not exist to satisfy the terms of the will. We have, therefore, a latent ambiguity. An ambiguity "may arise when the will contains a misdescription of the object or subject: as where there is no such person or thing in existence." *Patch vs. White*, 117 U. S. Rep. 210, 217. "A latent ambiguity can exist within the meaning of our decisions only where necessary to identify the subject-matter or object of a devise." *Mizener's Estate*, 262 Pa. 62, 66. Such being the case parol evidence is admissible for the purpose of removing this latent ambiguity and thus giving effect to the will which otherwise would be inoperative: *Patch vs. White*, supra; *Best vs. Hammond*, 55 Pa. 409; *Metzger's Estate*, 222 Pa. 276; *Mizener's Estate*, supra.

The only property that the testator, Hallbauer, ever did own in said city was 245 North Front street. He acquired title to this property by deed dated March 27, 1893, which deed was, on April 11, 1893, recorded in the Recorder's office of Berks county. The place where 245 would be located on North Fourth street is a public school building belonging to the Reading School District. The said School District has had title to the property since June 23, 1873, and the school building erected thereon has been there since at least 1890. It is plain that an error was made in writing the word "Fourth" instead of the word "Front." The plaintiff, Wilhelmina Clappier, therefore, has title under the will of William Hallbauer to the property which she has agreed to convey to the defendant: *Patch vs. White*, supra; *Collins et al. vs. Capps et al.*, 85 N. E. 934; *Morgan vs. Russo*, 51 Pitts. Leg. Jour., 382.

At the time of the trial we directed the jury to bring in a verdict in favor of the plaintiff for \$2,700.

Defendant's rule for judgment n. o. v. is discharged.

HALTZELL vs. PRINTZ et al.**Fraud—Evidence—Weight of Evidence—New Trial.**

Where the issue is fraud and plaintiff's oral evidence in support thereof is contradicted by all the other evidence and by all the fair deductions therefrom and by plaintiff's own evidence at a former trial, a new trial will be granted.

In the Court of Common Pleas of Berks County.

No. 123 August Term, 1916.

Assumpsit: Trial and verdict in favor of plaintiff for \$24,504.65.

Rules for new trial and judgment n. o. v.

Snyder, Zieber & Snyder for defendants and rules.

W. B. Bechtel, Rothermel & Mauger, contra.

Opinion by Wagner, J., April 7, 1919.—In an opinion filed in this case on January 26, 1918, we granted a new trial on the ground that the verdict was against the weight of the evidence. Upon a retrial the jury for the second time found a verdict in favor of the plaintiff. Defendants have filed rules for new trial and for judgment n. o. v. The present rule for a new trial is again based upon the allegation that the verdict is against the weight of the evidence. It is not necessary to repeat what was said in our former opinion, because what we there said applies to the determination of defendants' present rules, and must be considered in connection with the additional matter stated in this opinion.

The evidence at the two trials was practically the same, except in two instances. First, the plaintiff at the second trial testified more positively than at the first trial that he had sold his stock upon defendants' representations, which led him to believe that the total indebtedness of the Prince Furniture Company was \$140,000, whereas it was only \$90,000, said sum including a preferred stock indebtedness of \$50,000; second, Omri F. Hibbard, plaintiff's chief counsel in the negotiations that led to the sale of plaintiff's stock, positively testified that the sale of the stock was made upon the basis of a total indebtedness of \$90,000, the \$90,000 including the preferred stock indebtedness of \$50,000; whereas at the first trial he stated that his mind was not clear upon that question. He thus in this trial flatly contradicts plaintiff. His evidence is, upon cross-examination, pp. 91, 92, 93:

"By Mr. Snyder:

Q. "Mr. Hibbard, as I understand you, the impression made on you was that they had first paid in the preferred stock and afterwards wanted to shift it around to make an indebtedness of it? A. That is the way I interpreted the transaction.

Q. "That instead of having it stand as preferred stock, liable to all the contingencies of stock, they had in some way shifted it around so that it stood as an indebtedness to the Penn Bank? A. Yes, sir.

Q. "Is that right? A. That is my understanding of what they had attempted to do.

Q. "But it wasn't your understanding that there was \$90,000 indebtedness to the Penn National Bank by the Furniture Company and the preferred stock still paid? A. No.

Q. "But the particular thing I am inquiring about now is the status of that \$90,000 with relation to the \$50,000. What I want to know is whether you understood there was an indebtedness of \$140,000 instead of \$90,000? A. I didn't so understand.

Q. "And it wasn't so represented by these gentlemen, was it? A. I can't tell just what they said, but I certainly didn't so understand it myself.

Q. "The \$90,000 was represented as being in the hands of the bank? A. Yes, sir.

Q. "And included in that \$90,000 was the \$50,000 which these gentlemen were responsible for or had paid over for the preferred stock? A. My understanding or impression was they had paid it over at first in payment of the preferred stock, and the stock issued as fully paid stock, and then later they had caused notes of the corporation to be issued covering the same amount and then money had been borrowed upon that. That was my understanding of the transaction.

Q. "And upon that understanding you advised a settlement? A. Yes, sir."

The books and papers of the company, with notations thereon in the plaintiff's handwriting, the evidence of the bookkeepers, and the letter of plaintiff's private secretary clearly indicate that plaintiff must have known from the inception of the company that the \$50,000 preferred stock was carried upon the books of the company as a note indebtedness and was included in the \$90,000 note indebtedness. Plaintiff's statement at this trial that he sold his stock upon the basis of a \$140,000 indebtedness of the firm is also contradicted by his evidence at the former trial, as is shown by his cross-examination on pp. 33, 34, N. of T.

Plaintiff's oral evidence to establish fraud therefor stands alone and is contradicted by all the other evidence in the case. While fraud must be established by clear and satisfactory evidence: *Suravitz vs. Prudential Ins. Co.*, 261 Pa. 390, 399; *Pusic vs. Salak et al.*, 261 Pa. 512, 518, yet where plaintiff gives positive evidence of fraud it can not be declared as a matter of law that the evidence did not come up to that standard. In *Pusic vs. Salak et al.*, *supra*, at page 519,

we have: "Assuming that the burden of proof here was on plaintiff and that it required the high degree of evidence known as 'clear, precise and indubitable,' yet it cannot be declared as matter of law that it did not come up to that standard. See McGrann vs. P. & L. E. R. R. Co., 111 Pa. 171. Whether the evidence is true is a question of fact; if true, whether it is sufficient is a question of law." Because the issue is fraud and plaintiff's oral evidence in support thereof is contradicted by all the other evidence and by all the fair deductions therefrom and by plaintiff's own evidence at the former trial, we fail to see how we can do otherwise than grant a new trial. In Maloy vs. Rosenbaum Co., 260 Pa. 466, at page 472, Mr. Justice Moschzisker says: "A grave responsibility rests upon the trial judge to see to it that no verdict contrary to the weight of the evidence or shocking to judicial conscience is allowed to stand, no matter how many new trials must be granted in order to effect the ends of justice; and this will always be so, until the fundamental law, which ordains that trial by jury shall be as heretofore, is changed to give greater power, in the realm of fact, to the judiciary." See also Hewitt vs. Democratic Pub. Co., 260 Pa. 59; Bradican et al. vs. Scranton Ry. Co., 260 Pa. 555.

We cannot sustain defendants' rule for judgment n. o. v. upon the ground that there was no evidence of the real value of the stock at the time of the sale. Plaintiff showed the book value. This book value consisted largely of instalment leases. It is well known that the face value of such leases is not their actual value. Defendants, however, called a number of witnesses who are engaged in the instalment business, and showed the relation of the face value of instalment leases to their real value. Defendants, therefore, supplied the connection between the book value and the real value, and made the real value a matter for the jury's determination.

Rule for new trial made absolute. Rule for judgment n. o. v. discharged.

BOBST'S ESTATE.

Decedents' Estates—Wills—Vested remainder.

1. Where a legacy is made payable at a future time, certain to arrive, and not subject to condition precedent, it is vested, where there is a person in esse at the time of the testator's death capable of taking when the time arrives, although his interest be liable to be defeated altogether by his own death.

2. The mere fact that the remainderman may not outlive the precedent estate, so as to come into actual possession, will not without more, render the estate contingent.

Bankruptcy—Property passing to trustee—Remainder vested in Bankrupt.

3. By virtue of section 70 (a) of the Bankruptcy Act the trustee is vested with the title of the bankrupt as of the date of the adjudication to all property which prior to the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.

4. All vested estates pass to a bankrupt's trustee, irrespective of whether the bankrupt's possession or enjoyment of the estate is postponed or not.

5. A testator gave to his widow a life estate in certain real estate and directed that upon her death it should be sold by his surviving executor and bequeathed the proceeds obtained from such sale to his three children, naming them, or their heirs in equal shares. Subsequent to testator's death and prior to his widow's demise, W., a son was adjudicated a bankrupt. His trustee filed a petition praying for an order upon W., surviving executor, directing him to comply with the provisions of the will of the testator by forthwith selling the real estate. Held, that the remainder given to W. vested in him at the death of the testator subject to the life estate in favor of the widow, and as such passed to his trustee in bankruptcy.

In the Orphans' Court of Berks County.

In the matter of the petition of George Bland, trustee in bankruptcy of William C. Bobst, surviving executor, to show cause why an order should not be made directing him to sell certain real estate of said decedent.

E. H. Deysher for William C. Bobst, executor.

T. I. Snyder and John B. Stevens for George Bland, trustee of William C. Bobst.

Opinion by Schaeffer, P. J., March 22, 1919.—George Bland, trustee in bankruptcy of William C. Bobst, filed his petition praying for an order upon William C. Bobst, surviving executor of William J. Bobst, deceased, directing him to comply with and carry out the provisions of the will of the testator by forthwith selling certain real estate of the testator, and the Court awarded a citation to show cause therein. The respondent filed a demurrer which questions the petitioner's right to the relief prayed for, on the ground that the trustee in bankruptcy has no interest in this estate.

William J. Bobst, died April 8, 1909. By his will and the codicil thereto, he devised certain of his real estate to his wife Sarah Bobst for the term of her natural life. He further directed:

"After the decease of my said wife Sarah Bobst I direct that the real estate held by her during her life shall be disposed of as follows, to wit:

4. I direct my surviving executor herein named, to sell my house and lot of ground No. 521 Chestnut Street, Reading, Penna., and also my house and lot of ground situate in the rear of No. 410 Laurel Street, Reading, Penna., either at public

or private sale, and execute and deliver unto the purchaser or purchasers thereof, a good and sufficient deed or deeds in fee simple.

The net proceeds obtained from the sale of such real estate, I give and bequeath unto my three children, William C. Bobst, Emma L. Romig and Laura S. Rotz, or their heirs in equal shares absolutely."

On May 2, 1917, when the testator's widow was still living, a petition in involuntary bankruptcy was filed in the District Court against William C. Bobst, which resulted in an adjudication of the said William C. Bobst as a bankrupt on May 29, 1917, and the subsequent appointment of the petitioner George Bland, as his trustee in bankruptcy.

The testator's widow, Sarah Bobst, died May 7, 1917, a date subsequent to the filing of the petition in bankruptcy. The question raised here is, did William C. Bobst prior to the death of his mother Sarah Bobst and at the time of the filing of the petition to have him declared a bankrupt, have such an interest in the proceeds to be derived from the sale of the real estate No. 521 Chestnut Street and 410 Laurel Street, in this City, as would pass to his trustee in bankruptcy and did such interest so pass to the trustee? If the bankrupt's interest in his father's estate passed to his trustee in bankruptcy, then the trustee has standing in this Court to ask for the relief prayed for, it also appearing that there is no other good reason why William C. Bobst, the surviving executor, does not execute the power of sale.

By virtue of Section 70 (a) of the Bankruptcy Act, the trustee upon his appointment and qualification is vested with the title of the bankrupt, as of the date of the adjudication, to all "(5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." Under this section, therefore, any property interest which the bankrupt had prior to or at the time of the filing of the petition vested in his trustee appointed thereafter. It is the condition of the bankrupt's estate at the time of the filing of the petition, which fixes the interests in property that vest in the trustee at the time of the adjudication: *Everett v. Judson*, 228 U. S., 474-479. The question then is, did or did not William C. Bobst, the bankrupt, from and after the death of the testator and during the lifetime of his mother have an interest in the proceeds to be derived from the sale of the real estate mentioned, which prior to the filing of the petition in bankruptcy he "could by any means have transferred or which might have been levied upon and sold under judicial process?"

It has been uniformly held that all vested estates pass under the aforesaid section to a bankrupt's trustee, irrespective

of whether the bankrupt's possession or enjoyment of the estate is postponed or not. If his estate is vested, or if he has a vested interest the enjoyment only of which is postponed, such estate or interest passes to his trustee in bankruptcy: *In re Twaddell*, 6 Am. B. R. 539, 110 Fed. 145; in *re Wetmore*, 6 Am. B. R. 210, 108 Fed. Reporter 520; in *re Dorgan*, 38 Am. B. R. 157, 237 Fed. Reporter 507; *Pollock v. Myer Bros.*, 36 Am. B. R. 835, 233 Fed. 861.

I am of the opinion that the remainders given to William C. Bobst, Emma L. Romig, and Laura S. Rotz, vested in them at the death of the testator, subject to the life estate in favor of the widow. The testator gave to his widow, Sarah Bobst, a life estate in the real estate referred to, and directed that upon her death it should be sold by his surviving executor and bequeathed the proceeds obtained from such sale to his three children, William C. Bobst, Emma L. Romig and Laura S. Rotz, or their heirs in equal shares. Here the estate was bound to take effect in possession in the said three children, if they survived the life tenant, and that seems to be the true test. The mere fact that the remaindermen may not outlive the precedent estate, so as to come into actual possession, will not without more, render the estate contingent. In the recent case of *Marshall's Estate*, 262 Pa, 145, *Advance Reports*, Chief Justice Brown reiterated the rule stated by Justice Stewart in *McCauley's Estate*, 257 Pa. 377: "Where a legacy is made payable at a future time, certain to arrive, and not subject to condition precedent, it is vested, where there is a person in esse at the time of the testator's death capable of taking when the time arrives, although his interest be liable to be defeated altogether by his own death."

William C. Bobst and his sisters were in being at the time of the death of their father. The bequest to them though subject to a precedent life estate, was unconditionally payable to them—at the happening of an event certain to happen—the death of their mother—at which time they would have been capable of taking if living. In the *Davidheiser Estate*—10 *Berks Co. L. J.*, 97, the decedent had given his widow a life estate in his real estate and directed the same to be sold after his death and the proceeds divided among his children, naming them, it was held that a daughter who died before the widow had a vested interest and that her personal representative was entitled to participate in the distribution. In that opinion I reviewed some of the rules and authorities to be applied in determining whether a legacy is vested or contingent, and consequently will not lengthen this opinion by repeating them. In *Marshall's Estate*, *supra*, will be found a statement of the rules and reference to authorities that bear on this question.

Counsel for William C. Bobst, contends that the words "or their heirs" are words of substitution, and that consequently William C. Bobst, had merely a contingent interest in his father's estate, and that if he would have died during the lifetime of his mother, his heirs would have been substituted to his share. It will not be necessary to pass on the question whether or not the words "or their heirs" are words of limitation or purchase, because whether the estate which vested in William C. Bobst was absolute or contingent can make no difference in this case, so far as the rights of the trustee are concerned. Assuming, however, that the words "or their heirs" are substitutionary in their effect, yet William C. Bobst took a vested estate in his legacy, subject to be divested if he died during the lifetime of his mother, the life-tenant: *Neel's Estate*, 252 Pa. 394. And again, if his interest was wholly contingent upon the happening of his mother's death, it was manifestly something more than an expectancy, and consequently passed to his trustee in bankruptcy. In *Robbins's Estate*, 199 Pa. 500, Judge Ashman of the Court below, in an opinion adopted by the Supreme Court clearly points out the difference between a real interest and a mere expectancy in an estate. In that case it was held that when a testator directs that certain real estate shall not be sold during the life of the life tenants to whom he devised it, and not until the full expiration of twenty years from his decease, and that when sold the proceeds should be distributed amongst his nephews and nieces "and the lawful issue of such of my said nephews and nieces as shall then be deceased" the nephews and nieces take interests which were more than mere expectancies and which will pass under an assignment for the benefit of creditors. The general principle is, that whatever the bankrupt might assign passes to the trustee in bankruptcy. Bare possibilities, such as an expectancy of an heir do not pass; but possibilities coupled with an interest do. In *Churchman's Appeal*, 22 W. N. C. 131, it was held that a contingent interest in a legacy will pass by an assignment in bankruptcy under the old Act, made by a legatee prior to the occurrence of the contingency on which the legacy depends.

An examination of the will and codicil shows that the testator in a number of bequests to the members of his family frequently used the words "or their heirs." In the eleventh item he directs the residue of his estate to be divided "among my three children or their heirs they to hold the same absolutely." Here the testator clearly shows that the words "or their heirs" in the residuary clause are words of limitation and cannot be regarded as words of substitution. The children could not take an absolute estate if "or their heirs"

indicate words of substitution. To support the evident meaning of the testator we would be obliged to construe "or" to be, "and"; and this is permissible when it clearly appears that such intention would be frustrated by not doing so: *Gilmor's Estate*, 154 Pa. 523. Likewise in the codicil and in the item in question here, where testator gave the proceeds to his children "or their heirs" the word "or" must be construed to be "and" because testator in his will clearly indicates that this is the sense in which he used the word "or."

My conclusion is that William C. Bobst had a vested interest in the estate aforesaid, which passed to the trustee in bankruptcy at the time of the filing of the petition.

William C. Bobst, the surviving executor, is ordered and directed to carry out the provisions of the last will and testament of his father, and make sale of the real estate hereinbefore mentioned and account for the proceeds derived therefrom.

WERNER'S ESTATE.

Res adjudicata—Construction of rule.

1. The rule that a cause of action once finally determined, without appeal, between the parties, on its merits, by any competent tribunal, cannot afterwards be litigated by new proceedings either before the same or any other tribunal, requires that the cause of action be determined on the merits by a competent tribunal and between the same parties, and that the tribunal had authority to pass on the question at the first adjudication.

Promissory Notes—Note under seal—Consideration.

2. Want of consideration is no defence to a note under seal unless fraud is alleged in its execution.

Decedents' estates—Liability of husband for medical attendance to wife.

3. A husband is primarily liable for the medical attendance and other expenses incident to his wife's illness and death although she has a separate estate.

In the Orphans' Court of Berks County.

No. 33 December Term, 1918.

Audit and Adjudication.

Caleb J. Bieber and Edward L. Miller for exceptant.

Paul H. Price for accountant.

William B. Bechtel for legatee.

Opinion by Schaeffer, P. J., April 28, 1919.—At the audit there was also presented for allowance and payment a note dated March 30th, 1901, made by Emma M. White, who was

married to the accountant, and is now deceased, in favor of John White, her former husband, in the sum of \$500.00, with warrant of attorney to confess judgment, etc. The note which is under seal is made payable after the death of the maker, Emma M. White. Her estate being in Court, the administrator d. b. n. c. t. a., of John White, deceased, now asks for payment of the same.

The validity of this note is called into question by the accountant, surviving husband of decedent; and the following grounds of defence are set up: (1) The note is without consideration; (2) the note was intended to be testamentary; (3) it is res adjudicata. These reasons may be considered together, because they are based on the findings and testimony in the adjudication of the estate of John White, deceased, wherein Emma M. White, now Werner, the decedent here, was the accountant. In that adjudication filed to No. 32 March Term, 1911, it appears that the children of John White, deceased, the issue of a former marriage, filed exceptions to the account of Emma White, the administratrix. One of the exceptions was: "The said accountant failed to charge herself with all the money which came or should have come into her hands." The accountant had not charged herself with this \$500.00 note. At the hearing on the exceptions counsel for exceptants called the accountant Emma White, and examined her on matters alleged in the exceptions. During the examination she was questioned concerning the \$500.00 which she had given to her husband. The testimony on this point is as follows:

"Q. Do you account for the \$500.00 note which had been given to your husband? A. The note that I gave to my husband? Q. Yes? A. I never gave him a note—a kind of will that I made when I died he would get \$500.00. Q. Isn't it in the nature of a note? A. Something like it, yes, sir. Q. The note in which you agreed to pay \$500.00 at your death? A. Yes; but he died before me. Q. Who has the paper? A. They have it. Q. Whom do you mean by they? A. I don't know whether the lawyer or the children have it; he told me it was destroyed.

"Mr. Sharman: Mr. Edward Miller, an attorney of Lebanon, had that note in his possession when we last saw it.

"The Court: What does it say?

"Mr. Sharman: It is a paper that promises to pay \$500.00 at Mrs. White's death; it is written in the form of a note; but it has the effect of a will—wouldn't take effect until after the death of Mrs. White."

Testimony was also taken concerning the \$800.00 note and certain items in the account and the exceptions.

In the adjudication Judge Bland says, "that the evidence is, that Mrs. White had a separate estate and that her husband had no estate of his own; that he died at the age of seventy five years, during the last ten of which he was unable to work, and was supported by his wife; that the parties were married fourteen years, during four of which White worked as a stationary engineer at \$1.50 per day; and that the exceptions are without merit and are overruled."

The surviving husband, the accountant in this estate, contends, that the testimony quoted above and the findings of Judge Bland show that the \$500.00 note which is now presented for payment is without consideration and that the validity of this claim was adjudicated in that estate.

The res adjudicated in the adjudication No. 32 March Term, 1911, was the exceptions, which did not refer to nor include the \$500.00 note,—by its very terms not due or collectable at the time. The Court was not requested by the exceptants at said audit to surcharge the accountant in the sum of \$500.00, and it would have been without authority to do this, because the note was not due at the time. The note was referred to incidentally, but no effort was made to prove its validity at that hearing. It was not produced in Court and the record does not show that it was under seal. Judge Bland not knowing all the terms of the note and knowing that it was payable after Mrs. White's death, surely did not intend to pass on the validity of it, in view of the other questions raised by the exceptions, when he found as a fact that Mr. White was without means for some time prior to his death, and that he was dependent on his wife during his latter years. It is argued that this finding shows that the note was without consideration. When the Court asked, "what does it say?," counsel repeated "It is a paper that promises to pay \$500.00 at Mrs. White's death; it is written in the form of a note; but it has the effect of will—wouldn't take effect until after the death of Mrs. White." There was no further discussion about the note. The testimony in the White adjudication clearly shows that the exceptants called Mrs. White's attention to the note because they knew there was a note, but did not seem to know the character of it nor where it was. We do not think that the record in that adjudication supports the position, that the question of fact, viz, the validity of the \$500.00 note, which is now raised, was determined in that proceeding. There is not a word in the adjudication filed by the Court concerning this note; the only reference to it being the testimony quoted, and from this we cannot say that the validity of it was finally settled in that proceeding. The subject matter in these two estates is not the same, and the question raised here was not submitted to the Court in the former adjudication and passed upon by it.

In Bowers' Estate, 240 Pa. 388, Justice Stewart, says, "A cause of action once finally determined, without appeal, between the parties, on the merits, by any competent tribunal, cannot afterwards be litigated by new proceedings either before the same or any other tribunal. This is a rule dictated by a public policy which demands that when a fact has been judicially and finally determined between the same parties, contention with respect thereto must cease." It will be noted that this rule requires that the cause of action be determined on the merits by a competent tribunal and between the same parties. In the case at bar the validity of the note was not determined in the White adjudication nor was the controversy between the same parties. In that adjudication the children of the decedent were the exceptants and Mrs. White was the accountant, and the proceeding was against her as administratrix of John White, deceased. In this estate the claimant is the administrator d. b. n., of John White, deceased, and the other party is the estate of Emma White, now Werner, deceased. Moreover, it has been held that the rule that what has once been judicially determined shall not again be made the subject of litigation, extends only to questions in the proceeding that were legally cognizable: *Nernst Lamp Company v. Hill*, Appellant, 243 Pa. 448. The note in question being under seal and payable after the death of the maker, and therefore irrevocable (*Mack v. Persons*, 68 Pa. 231) the Court had no authority to pass on its validity at the first adjudication. A decision either one way or the other would not have affected the interests or assets of that estate, and consequently the validity of the note was not legally cognizable by the Court in the other adjudication. If the Court had attempted to determine the status of the note, and held that it was a lawful obligation, it is clear that it could not have been collected before the maker's death. Again, the note was under seal, and the seal importing consideration, want of consideration is no defence to such a note: (*Candor v. Henderson*, 27 Pa. 119, 120), and can only be raised where fraud is alleged in the execution of the note: *Burkholder's Executor v. Plank*, 69 Pa. 225. There has been no such allegation nor was any attempt made at any time to show fraud in the execution of the note. Indeed, it appears from the testimony given by H. G. Light at the audit of this estate that the note was given for a valuable consideration, and in his presence after Mr. and Mrs. White had discussed the matter and requested him to write it. There is no merit in the contention that the paper or note was testamentary in effect. Mrs. White could not by her own testimony put a construction on the paper, and say that it is testamentary. The note or

paper speaks for itself, and the construction of it is for the Court.

Exceptions have been filed by claimant of note to items of credit taken by the accountant for money paid for nursing, hospital expenses, etc. If claimant had failed in establishing the validity of the note, we could have dismissed the exceptions, because then he would not be in a position to object. But unfortunately for accountant the claim must be allowed and the exceptions sustained. We recognize that the husband has been subjected to a heavy expense and that the payment of these bills will be a hardship on him, but since there is an objection to these credits, we are obliged to follow the rule, that a husband is primarily liable for the medical attendance and other expenses incident to his wife's illness and death although she has a separate estate: Conn's Estate, 65 Pa. Superior Ct. 511.

The claim is allowed, with interest from date of decedent's death, April 25, 1918, to date of audit, January 11, 1919, amounting to \$21.33, and the exceptions are sustained, requiring a surcharge of \$1,583.17.

YOCOM'S ESTATE.

Decedents' Estates—Wills—General and particular intention of testator—Failure to dispose of residuary estate.

1. A testator, having failed to dispose of part of a portion of his personal property by the terms of the will, it is presumed that his general intention at the time of his death was that whatever was not specifically bequeathed should be distributed under the intestate laws.

2. Where there is a general and a particular intent which are inconsistent, the particular is to be sacrificed to the general intent.

3. Testator bequeathed \$225 to his son B. and stated in his will that he deemed such bequest "a full and complete distributive share for my son Benjamin and under no circumstances is my son B. to receive any other part of my estate." The will failed to dispose of the residue of testator's real and personal property. Held, that the son B. takes his share of the residue under the intestate laws.

In the Orphans' Court of Berks County.

No. 4 March Term, 1919.

Audit and Distribution.

Ira P. Rothermel for the accountants.

Joseph R. Dickinson for Benjamin F. Yocom, legatee.

William E. Sharman for Kate Potteiger, legatee.

Opinion by Schaeffer, P. J., May 3, 1919.—With respect to the distribution, it is to be observed that testator, after special legacies of \$225.00 and \$600.00, to his sons, Benjamin Franklin Yocom and George W. Yocom, respectively, and a disposition of the proceeds of his real estate, fails to say anything about the balance of his personal estate. The residue of his estate, embracing personalty, in other words, remains undisposed of, and to this extent, at least, he appears to have died intestate. No one, in fact, disputes this to be so.

By the second item of the will, however, testator has evinced an intention to limit his son, Benjamin F. Yocom to \$225.00 of his estate; and in view of this intention there appears to be some question as to whether Benjamin is entitled to participate with the other children in a distribution of that part of the estate undisposed of by the will.

The second item of the will leaves no doubt of testator's intention to give no more than \$225.00 to his son Benjamin F. Yocom. Testator says so in unmistakable language, and supports his intention with a reason. Benjamin had been indebted to him for "various sums of money" and, with what he had thus received, the legacy, in testator's view, was to be a full distributive share of the estate. This is a particular intention, and were there in the will, evidence of no other conflicting general intention, the particular one would prevail, and Benjamin could participate in the distribution only to the extent of his special legacy.

However, as already stated, testator died intestate with respect to the balance of his personal estate; and thus having failed to dispose of a part of his estate, the presumption is that he intended its distribution to be under the statute. In this omission on his part, consequently, we have a general intention which is in conflict with the particular; and, under the authorities, the general must prevail. In *Hitchcock v. Hitchcock*, 35 Pa. 393, Judge Woodward lays down and explains the rule very clearly. "A man," says he, "may by his will take his estate out of the intestate statutes, by devising it to others than his heirs-at-law, but if he do not, he cannot repeal or control those statutes. However clearly the particular intent, that Celinda should enjoy only \$2,000.00 of his estate, may have been expressed, it must give way to the general intent, which existed at the death of the testator, that whatever was not specifically devised should be distributed under the intestate laws. For such is another rule of interpretation found in all the text-writers, that where there is a general intent and a particular one, and these are inconsistent, the particular is to be sacrificed to the general intent."

The application of this rule to the present case makes the conclusion inevitable. Particularly, testator intended to limit his son Franklin to a special legacy of \$225.00; but generally, having failed to dispose of the greater portion of his personal estate, he must have intended its distribution under the statutes; and, necessarily, in this distribution, Franklin, as one of the heirs-at-law, participates. All the authorities sustain this conclusion, regardless of the words in the will specifically excluding him. In the early case of *Hitchcock v. Hitchcock*, supra, the Court made this clear: "Merely negative words are not sufficient to exclude the title of the heir or next of kin; there must be an actual gift to some other definite object." And, so far as the Court knows, no deviation from this rule has ever been permitted. On the contrary, it was in substance reiterated as late as *Thistle's Estate*, 263 Pa. 60, the Court there saying: "The conclusion last stated is inevitable; just as in any other case where one who has made a will, purporting to dispose of his entire estate, through some transgression of law, happens to die intestate as to a portion of his possessions, and these, under the statutes of distribution, go, in whole or in part, to persons whom it is apparent, from the body of the will, testator did not mean to benefit. For example, where persons entitled as heirs under the statute, are intentionally omitted from a will, but, subsequently, through enforced intestacy, take property the testator never intended them to have; which, as we all know, frequently occurs."

Our conclusion is, therefore, that notwithstanding the language in the will, limiting Benjamin Franklin Yocom to a special legacy of \$225.00, he is entitled to participate in that portion of the estate as to which testator died intestate. This conclusion disposes, also, of the contention of Kate Potteiger, that under the will she takes an absolutely vested estate in her share of the balance for distribution. This relates only to the proceeds of real estate, of which there is but \$57.00 here. At the audit all persons agreed that this fund may be regarded as personal. The share of the estate, therefore, which she receives is all personal; and since she takes it as a heir-at-law, and not under the will, it becomes unnecessary to determine what the nature of the estate is, given her by the will. Her share, consequently, will be distributed to her absolutely.

COMMONWEALTH vs. FRANKEL.**Criminal Law—Assault and Battery—Corporations—Right and Duties of Officers and Directors.**

The vice-president and director of a corporation, beyond the power to inspect the books and records of the company, has the right to go to any portion of the plant for the purpose of overseeing the management, and a manager who forcibly ejects him from the premises of the corporation while acting in such capacity is guilty of assault and battery.

In the Court of Quarter Sessions of Berks County.

No. 145 September Sessions, 1918.

Surcharge assault and battery.

Verdict of guilty. Rule for new trial.

Snyder, Zieber & Snyder for defendant and rule.

Wilson S. Rothermel, District Attorney, for Commonwealth.

Opinion by Wagner, J., February 10, 1919.—The defendant was found guilty upon the charge of assault and battery. The prosecutor, Myer Axelrod, was a director and vice-president of the Safety Machine Company, doing business in Reading, Pa. The defendant claimed to be manager under appointment of the vice-president. The prosecutor had formerly been the manager, but it was claimed that he had been removed by the president of the corporation. The alleged assault and battery arose out of the forcible ejection by the defendant of the prosecutor from the second floor of the manufacturing plant of the aforesaid corporation. The motion for a new trial is based upon an offer of evidence, which, upon objection, was not admitted. The offer was:

"We offer to prove that the said Myer Axelrod, in addition to holding the office of director and vice-president of the Safety Machinery Corporation, which we admit he held at the time of the alleged assault, had been employed by the said corporation under an agreement, which employment was terminable at the will of said corporation; that on August 1, 1918, the president of said corporation, one Joseph Frankel, who under the by-laws of said corporation had power and authority to appoint and discharge agents and employees subject to the approval of the board of directors and had the general management of the affairs of said corporation, met the said Axelrod by appointment in New York city, and then and there, for the reasons stated by him to said Axelrod, informed the said Axelrod that his services as an employee were no longer required, and notified him that he should forthwith cease his activities as an employee and superintendent of the corpora-

tion's factory at Reading, his salary, however, to be continued for a period of two weeks; that the said Axelrod assented to this and agreed to forthwith cease his activities as superintendent of said factory and as an employee of said corporation; that the said Joseph Frankel also instructed the said Axelrod to keep off the second floor of said factory where the actual work of manufacturing was conducted by the said corporation, informing him, however, that he would be permitted to have access to the office of the corporation, which was located on the first floor of said factory building, to all which the said Axelrod assented and agreed; that thereupon the said Joseph Frankel communicated by telephone with the defendant, Louis Frankel, at Reading, he being the treasurer and general manager of said corporation, and informed him of what had occurred and instructed him to see to it that the said Axelrod should forthwith cease his activities as superintendent of said factory and should keep away from the second floor of said factory building; that upon the following Monday, August 5, 1918, the defendant, upon arriving at the factory in the afternoon, found the said Axelrod upon the second floor of said factory building actively directing the manufacturing work that was then being carried on, giving orders to the workmen then employed and otherwise acting contrary to the instructions of the president of said corporation; that the defendant thereupon requested the said Axelrod to cease his activities and ordered him to leave the manufacturing floor of said factory, and, upon his refusal so to do, forcibly ejected him from the said second floor of said factory building, using, however, no more force than was necessary and requisite in order to overcome the said Axelrod's resistance, this for the purpose of justifying the action of said defendant in forcibly ejecting the said Axelrod from the second floor of said factory building."

This was refused upon the ground that, even if the defendant was the manager of the defendant corporation, he did not have the authority to eject from the premises of the corporation the vice-president and director thereof.

It is clear from the admitted facts that the defendant was an employee of the corporation, the management of which lies in the directors. We have, therefore, an employee or under officer of a corporation attempting to eject from the premises a director who is a member of the board that employed him. The cases cited by the defendant in support of his motion for a new trial have no application in that they are cases of a discharged employee who is ejected by the owner after his term of employment ceases. In such a case the discharged employee, upon refusal to leave the premises, becomes a trespasser. In *Machen vs. Electrical Mfg. Co.*, 237 Pa. 212, on page 217, we have this stated by Mr. Justice Mestrezat:

"Judge Thompson in sustaining the right of a director to such inspection says in his admirable work on Corporations (2d Ed.) vol. 4, p. 993: Of this right of the director it has been said: 'The duty of a director is to direct, and if he neglects this duty he is certainly guilty of a moral wrong, if not a legal one. To perform this duty intelligently it is essential that he should keep himself informed as to the business affairs of the corporation and as to the acts of all its executive officers'"

As declared in the case just cited, in order to keep himself informed of the business of the corporation, he has the unqualified right to inspect its books, records and documents. This right of inspection is a personal right. "The duty to manage the corporation rests alike upon each and every one of the directors, and, therefore, it is the right of each director to inspect its books and documents." *Machen vs. Electrical Mfg. Co.*, supra. The powers, however, of a director are clearly not limited to the mere inspection of books, records and documents. As a trustee for the stockholders, he has the right to go to any portion of the plant for the purpose of seeing or looking after the management thereof. A director must acquaint himself with the business of the corporation. He must be diligent in the exercise of his duties. "While the directors of a corporation may and must commit the details of its business to inferior officers this does not absolve them from the duty of maintaining a reasonable supervision; and if such inferior officers waste the assets of the corporation it is conceded that the directors cannot escape liability on the ground that they did not know of the wrong-doing, provided that it appear that their ignorance was the result of a want of that care which ordinarily prudent and diligent men would exercise under similar circumstances. The true rule, disregarding casuistic distinctions as to degrees of care and negligence, holds directors liable for being ignorant of what they might have discovered by exercise of that good business diligence which the law imposes upon them." 10 Cyc 832.

The offer of evidence admits that the prosecutor had been employed by the corporation. The offer states that this employment was terminable at the will of the corporation. It further states that the president of the corporation, under the by-laws, had the power to discharge employees subject to the approval of the board of directors. It is not stated, however, that the discharge of the prosecutor, claimed to have been made by the president, had received the approval of the board of directors. He was consequently also an employee of the corporation. The offer also recites that the defendant had requested the prosecutor to cease his activities and ordered him to leave the manufacturing floor of said factory, and upon his refusal so to do forcibly ejected him. Even if he be consid-

ered not an employee, but only as a director and vice-president of the company, the defendant had no legal right to forcibly eject him from the second floor of the building. The president does not have the power to order or have ordered from the premises any director in the corporation. The offer of evidence was properly rejected.

Rule for new trial is discharged.

SHIRK vs. DIRECTORS OF POOR, ET AL.

Constitutional Law—Public Officer—Increase of Salary During Term—Act 24 May, 1917, P. L. 293—Section 13, Art. III of the Constitution.

Whether an officer is a "public officer" within the intendment of the constitutional prohibition depends upon the manner of his selection, the duties imposed and the powers conferred upon him. If he is chosen by the electorate for a definite and certain tenure in the manner provided by law to an office whose duties affect and are to be exercised for the benefit of the public for a stipulated compensation paid out of the public treasury, the incumbent is a public officer within the meaning of the constitutional provision.

A poor director in Berks county, elected in November, 1913, subject to the Act 3 May, 1909, P. L. 382, is a public officer within the meaning of Section 13, Art. III of the Constitution, and is thereby deprived of the right to receive an increase of salary under the Act 24 May, 1917, P. L. 293.

In the Court of Common Pleas of Berks County.

No. 99 October Term, 1918.

J. H. Jacobs for plaintiff.

W. E. Sharman for directors of poor.

Abraham H. Rothermel for county controller.

Opinion by Endlich, P. J., March 10, 1919.—From the first Monday of January, 1914, to the first Monday of January, 1918, the plaintiff was one of the Poor Directors of Berks county, duly elected to the office in November, 1913. At the time of his election and assumption of the office, the Act 3 May, 1909, P. L. 382, which was understood to be applicable, fixed the salary of County Poor Directors at the sum of \$1,000 per year. The Act 24 May, 1917, P. L. 293, undertook to increase the pay of such officers in the class of counties to which Berks County belonged to \$1,500 per year. The plaintiff continued to be paid at the rate of \$1,000 per year, his demand for the increase being refused by the controller. This action is brought to recover the alleged arrearages in plaintiff's salary by reason of that refusal.

A case having been stated for the opinion of the Court, the same was argued and decided in favor of the plaintiff. In the argument and decision, however, both counsel and Court overlooked the case of *Com. vs. Moffitt*, 238 Pa. 255. That case is

as nearly on all fours with the present one as can be, and rules the question here presented squarely and directly in favor of the defendants, under Art. III, Sec. 13, of the Constitution, which forbids the increase of salaries of public officers after their election or appointment, and is held to apply to poor directors constituted under a special Act of Assembly as in this county. A re-argument was promptly ordered and heard. All that remains now to be done is to dispose of this case as the Supreme Court's ruling in the one above cited requires us to do, to wit, in favor of the defendants.

And now, March 10, 1919, the opinion filed in this case on Jan. 25, 1919, is recalled and withdrawn from the files, the order directing the entry of judgment for plaintiff is vacated and set aside, and it is now ordered that judgment be entered upon the case stated in favor of the defendants.

BROWN vs. WERTZ AND COMPANY.

Statutes—Repeal by Implication—Warehouse Receipts Act, 11 March, 1909, P. L. 19—Act 14 December, 1863, P. L. (1864) 1127.

1. The question of implied repeal between two statutes is always one of legislative intent. That intent is ordinarily found in a statute revising the subject-matter of earlier ones and evidently intended as a substitute for them, but it cannot be found even in such an enactment where the latter itself declares a contrary purpose.

Thus, although the Warehouse Receipts Act 11 March, 1909, P. L. 19, Sec. 33, defines the procedure and notice required in order to legalize a sale for storage charges, the proviso in section 35 that the remedy stipulated therein shall not preclude any other remedies allowed by law for the enforcement of a lien against personal property, shows that the Legislature did not intend the Act of 1909 to repeal the Act of December 14, 1863, P. L. (1864) 1127, Sec. 2, providing a different remedy.

2. As exceptions strengthen the force of a general law, so enumeration weakens, as to things not enumerated.

Decrees—Statutory Proceedings—Presumption.

3. Where a judicial proceeding is authorized by statute and a decree or final order made in it, the presumption is that the Court meant to act under that statute, and that everything that was necessary to be done was done rightly and properly.

In the Court of Common Pleas of Berks County.

No. 90 August Term, 1916.

Rule to take off non-suit.

John B. Stevens and Thos. K. Leidy for plaintiff and rule.

Cyrus G. Derr and B. Y. Shearer, contra.

Opinion by Endlich, P. J., March 17, 1919.—In the fall of 1911 the plaintiff placed certain household goods in the storage warehouse of F. S. Wertz & Co. under a written contract

in the form of a non-negotiable warehouse receipt. In the summer of 1914 the warehouse was sold to a corporation newly created and taking it over as the Wertz Warehouse Co., F. S. Wertz & Co. retaining no interest in the property or the business. With these, the plaintiff's goods passed into the hands and custody of the new company. According to the arrangement between plaintiff and F. S. Wertz & Co., the former was to pay to the latter \$4.00 monthly for storage. The last payment made by him was for January, 1912. Removing from Reading, he gave various addresses from time to time, the last one in July, 1912. In March, 1915, the goods were sold to pay storage charges. This action of assumpsit is brought by the owner of the goods to recover damages for what is alleged to have been a breach of contract on the part of F. S. Wertz & Co. in handing over the goods to a third party, and thereby permitting the same to sell them in disregard of the procedure and notice required by the Warehouse Receipts Act 11 March, 1909, P. L. 19, Sec. 33, in order to legalize a sale for storage charges.

In *Clowes vs. Hughes Bros.*, 3 Pa. Super. Ct. 561, it was laid down that where a warehouseman, denying the title of his bailor, gives up the goods entrusted to him by the bailor to another claiming them as owner, he commits an act of conversion which renders him liable to suit at the hands of the bailor. Although that is not the case we have here, yet it must be true that where a warehouseman, parting with the goods without justification, puts it beyond his power to return them to the owner, the result as to the latter is the same and the liability of the warehouseman also: see *Hoeveller vs. Myers*, 158 Pa. 461, provided the owner proves damages sustained by reason of it: see *Hennershotz vs. Gallagher*, 124 Pa. 1, 9; *Forrest vs. Buchanan*, 203 id. 454, 457. So far as the mere transfer to the warehouse company is concerned, it seems to have involved no possible injury to the plaintiff. His goods remained where he himself had placed them, and it was to his advantage that they were preserved for him in the face of the fact that they might have been sold sooner for payment of charges. And when it comes to the question of defendants' responsibility for the sale of the plaintiff's goods by the warehouse company, let it be granted that the requirement of the Act of 1909 as to notice, etc., was not lived up to. It is, however, in evidence that the sale of the goods was made under Act 14 Dec. 1863, P. L. (1864) 1127, Sec. 2, which provides—

"That upon the application of any of the persons, or corporations, having a lien upon goods . . . verified by affidavit, to any of the judges of the Courts of Common Pleas . . . setting forth that the places of residence of the owner and consignee of any such goods . . . are un-

known . . . it shall and may be lawful for a judge . . . to make an order . . . authorizing the sale of such goods . . . upon such terms, as to notice, as the nature of the case may admit of, and to such judge shall seem meet."

The plaintiff insists that as regards warehousemen this enactment is impliedly repealed by the Act of 1909. If indeed the Act of 1863 was not repealed by the Act of 1909, and if what was done here was done under the Act of 1863, then it would seem to be, and is by plaintiff's counsel admitted to be, conclusive against the plaintiff's right to recover that the very purpose and effect of the Act of 1863 are to justify and authorize a sale such as is here complained of, and that no right of action can accrue from it to the plaintiff. The cases of *Becket vs. B. & L. Ass'n*, 88 Pa. 211, and *Albright vs. B. & S. Ass'n*, 102 id. 411, are authority, if any be needed, to the effect that where a judicial proceeding is authorized by statute and a decree or final order made in it, the presumption is that the Court or judge meant to act under that statute and that everything that was necessary to be done was done rightly and properly. On the suggestion of a repeal of the Act of 1863 by that of 1909, it must be remembered that the question of implied repeal between two statutes is always one of legislative intent: *Fraim vs. Lancaster Co.*, 171 Pa. 436. That intent, it is true, is ordinarily found in a statute revising the subject-matter of earlier ones and evidently intended as a substitute for them: *Johnston's Est.*, 33 Pa. 511; *Rhoads vs. B. & S. Ass'n*, 82 id. 180. But it can require no argument to show that it cannot be found even in such an enactment where the latter itself declares a contrary purpose. That declaration is found in Sec. 35 of the Act of 1909, where it is ordained that—

"The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property."

Nor is it to be overlooked that the Act of 1863 has reference to "commission merchants, factors and all common carriers, or other persons" having "a lien, under existing laws, upon any goods, wares, merchandise, or other property, for, or on account of, the costs, or expenses, of carriage, storage, or labor bestowed" In part, therefore, at all events, it cannot have been meant to be affected by the Act of 1909, and this circumstance materially weakens the probability of its having been intended to be affected at all. It may further be noted that, whilst the Act of 1909 specifically repeals two statutes, one of 1866 and one of 1893, it does not mention as repealed the Act of 1863, thus opening the door to the application of the familiar principle laid down in *Page vs. Allen*, 58 Pa. 338, 346, that "as exceptions strengthen the force of a gen-

eral law, so enumeration weakens, as to things not enumerated." The presence at the end of the Act of 1909 of the usual general clause repealing all acts inconsistent with it adds nothing to its repealing force, bound as it is to have that effect without those words, because a later law repeals previous inconsistent ones whether it says so or not: *Hickory Tree Road*, 43 Pa. 139, 142.

The conclusion seems to be inevitable that the Act of 1863 has not been repealed by the Act of 1909, and that the proceeding under the former Act operates as a protection to defendants against the liability here sought to be enforced. If so, the non-suit complained of as error was properly entered, and it only remains to add that—

The rule to show cause is discharged.

MASSEY, TO USE, ETC., vs. GEISLER ET AL.

Judgments—Rule to Open—Practice, C. P.

1. On a petition to open a judgment the Court sitting as a chancellor must decide the question of the weight of the evidence. If it is in doubt upon this question, or as to the credibility of witnesses, a provident course would suggest the aid of a jury. If the testimony taken on the rule would be sufficient to justify the submission of the question to a jury, the Court may, in its discretion, make an order to open; but if on the testimony so taken the Court would set aside a verdict for the defendant, the Court should refuse to open.

Negotiable Instruments—Notes—Fraud on Maker.

2. Where a note is obtained from a maker under certain representations or agreements as to the use to be made of it, and is put into circulation in fraud of these representations, the holder of the note, to recover upon it, must show a purchase for value before maturity without notice of fraud.

In the Court of Common Pleas of Berks County.

No. 66 March Term, 1918, J. D.; No. 7 September Term, 1918, E. D.

Rule to open judgment.

Wm. J. Young and Thos. K. Leidy for defendants and rule.

Wilson S. Rothermel, Jefferson Snyder and Dawson W. Light, contra.

Opinion by Endlich, P. J., March 17, 1919.—On March 23, 1918, judgment was entered to No. 66 March T., 1918, J. D., in favor of Franklin F. Massey, to the use of the Myerstown Trust Co., upon a judgment note for \$9,960, dated Nov. 30, 1917, payable on demand after date (see *Brewing Co. vs. Foley*, 61 N. J. L. 428, 39 Atl. 650, and also *Volk vs. Shoe-*

maker, 229 Pa. 407, and *Bank vs. Beaver*, 25 Pa. Super. Ct. 494), on which Franklin F. Massey appears, as one of five makers, and also as payee and as assignor to the Trust Co. Among the makers are J. O. Geisler and Daniel W. Bohn. Execution having issued to No. 7 Sept. T. 1918, E. D., against these parties, they presented their petition to this Court praying that the judgment might be opened and they let into a defence.

A practical rule governing the action of the Court on applications of this kind was formulated in *Jenkintown Nat. Bank's App.*, 124 Pa. 337, at p. 345, and has been frequently reiterated since, as follows:

"It is difficult to lay down the precise measure of proof which should move a chancellor to open a judgment When . . . it comes to a question of the weight of the evidence, it is for him to decide to which side the scales incline. If he is in doubt upon this question, or as to the credibility of witnesses, a prudent course would suggest the aid of a jury. . . . if the testimony taken on the rule would be sufficient to justify the submission of the question to a jury, the Court may, in its discretion, make an order to open; but if, on the testimony, so taken, the Court would set aside a verdict for the defendant, the Court should refuse to open."

As gathered from the petition, answer and depositions filed in this application, it appears to be the contention on the part of the petitioners that the note was signed in blank and given to Massey with authority to fill it out for an amount not to exceed \$750, covering two notes of Massey's upon which these parties were respectively liable, and that he took it or sent it to the Trust Co., whose treasurer, with Massey's knowledge and assent, filled it out for \$9,960, the aggregate of all the notes outstanding against him in the hands of the Trust Co.—a departure from the original understanding of which they were first apprized by the execution issued against them for over \$10,000. On the part of the Trust Co. it is insisted that the note was signed after having been filled out. In the former case it would seem that the Trust Co. really drew up, or made out, the note in question; that it was the business of its officers in so doing to inquire as to the amount for which the note was authorized to be filled out; and that the failure to make such inquiry subjects the note in the Trust Co.'s hands to the defence here proposed (see *Volk vs. Shoemaker*, supra). It is the doctrine of a long line of cases, of which *Smith vs. L. & B. Ass'n*, 93 Pa. 19, and *Erie Boot & Shoe Co. vs. Eichenlaub*, 127 id. 164, are typical, that where a note is obtained from a maker under certain representations or agreements as to the use to be made of it, and is put into circulation in fraud of these representations, etc., the holder of the note, to recover

upon it, must show a purchase for value before maturity without notice of the fraud. We are not required to go quite the full length of this doctrine in order to hold the virtual maker of the note, being also its holder, to adequate inquiry; and it is not conceived that the Negotiable Instruments Act of 1901 was intended or is effective to exempt the holder under such circumstances from the taint of fraud in the inception of the note, in the absence of proof of bona fides, etc.

Without a detailed discussion of the facts and evidence in this case, in advance of its trial by jury, it may, we believe, safely be said that there is enough, under the rule above stated, to justify, and indeed demand, the granting of the prayer of the petitioners.

The rule to show cause is made absolute.

BERKS COUNTY TRUST COMPANY vs. READING PAPER MILLS.

Workmen's Compensation Law—Jurisdiction—Practice—Appeal—Refusal of Board to Grant a Hearing de novo.

1. On an appeal from the Workmen's Compensation Board the Court of Common Pleas has no right to re-examine the evidence before the referee or board, but is empowered to gather from the record returned on the appeal what was the basis of the findings and of the decision and to judge of its legitimacy. If based on competent evidence, direct or circumstantial, the facts found are conclusive upon the Court.

2. The Workmen's Compensation Act gives the Court of Common Pleas no authority to review the action of the Workmen's Compensation Board in refusing to grant a hearing de novo on the basis of after-discovered evidence.

In the Court of Common Pleas of Berks County

No. 27 September Term, 1918.

Appeal from Workmen's Compensation Board.

W. E. Sharman for defendant and appellant.

H. J. Dumn for plaintiff.

Opinion by Endlich, P. J., March 17, 1919.—This is an appeal from the decision of the Workmen's Compensation Board affirming the award of the Referee in the claim of a widow, in behalf of herself and children, for the death of her husband. The grounds advanced are (1) that there is a total absence of competent testimony of injury to the decedent in the course of his employment by the defendant company, and (2) that there was after-discovered evidence of a material character which was asked to be made the reason for a hearing de novo before, but not recognized as such by, the Board.

(1) Most of the principles controlling the exercise by this Court of the jurisdiction here invoked are explained in *McCauley vs. Imperial Woolen Co.*, 261 Pa. 312, and *Wolford vs. M. & S. Co.*, 262 id. 454. We have no right to re-examine the evidence before the Referee or Board, but we are empowered to gather from the record returned on the appeal what was the basis of the findings and of the decision, and to judge of its legitimacy. They cannot be founded on hearsay evidence alone, and findings without evidence other than such as is incompetent constitute error in law. But material facts may be made out by circumstantial evidence. If based on competent evidence, direct or circumstantial, the facts found are conclusive upon this Court. If all we have here as to the cause of the decedent's injury were what he said to his fellow-workman on returning from the basement of the mill, and to others later, it would not perhaps amount to evidence at all, but have to be rejected as hearsay. (But see *Van Eman vs. F. & C. Co.*, 201 Pa. 537, 540 et seqq., and *Smith vs. Stoner*, 243 id. 57). There is, however, more than this. There are the actions of the decedent indicative of great pain in the abdomen almost from the very moment when he returned from the basement, and there is the opinion of the medical men that a fall such as described by him was more likely to be the cause of his complaint than any disease. In *Merrett vs. Mut. Acc. Ass'n (Mich.)*, 57 N. W. Rep. 169, followed in *Taylor vs. Acc. Assur. Corp.*, 208 Pa. 439, 443, it was held that where the evidence fairly points to an accident as the cause of injury rather than an internal disorder, there is prima facie proof sufficient of the former to sustain a verdict of accidental injury. Upon the whole, the first ground of this appeal cannot be considered to be made out, in view of the policy and purpose of the statute, which manifestly require the Court to uphold the Compensation Board's action, as, according to Judge Woodward in *Hawman vs. Turnp. Road Co.*, 2 Woodw. 332, 336, it is its duty to uphold the verdict of a jury, where it can be attributed to the influence of legal testimony, "even by a strained intendment."

(2) It is alleged by the defendant that after the decision by the Workmen's Compensation Board certain parties volunteered to the defendant the statement that decedent had fallen, and had said he had fallen, on the ice at his home. (In affidavits filed in the case this allegation is denied by some of the parties named). The defendant asked for a hearing de novo on the footing of this as after-discovered evidence. The Workmen's Compensation Board refused the application for the reason that the testimony might and ought to have been produced at the hearing, and that "no good can be accomplished" by opening the case and granting a rehearing upon it. No authority has been pointed out to us in the statute or in any de-

cision for a review of this action of the Workmen's Compensation Board. In certain cases where the statute demands a hearing de novo, an order therefor may, it seems, be made by the Court. But for the purpose here aimed at, such a power would appear to be inconsistent with the finality of the findings ordained by the Act of Assembly, and the lack of authority on the part of the Court to re-examine the testimony, which would be an essential prerequisite to a decision because involving the effect of the alleged new evidence in connection with the former. It would thus appear that the second ground is likewise not sustainable.

The appeal is dismissed.

COMMONWEALTH vs. ATLANTIC REFINING COMPANY.

Statutes—Interpretation—Taxation—Mercantile Tax Appeal From Assessment—Subject of Levy.

1. The language of a taxing act is to be understood in its ordinary popular significance unless something in the context shows it to have been used in another sense.

2. Whilst the language of a taxing act is to be strictly construed, yet the stringency required is not altogether like that controlling the construction of penal laws, but such as to effectuate the purpose of the enactment without extending it beyond its natural meaning or so as to impose a tax by implication, or amount to an amendment of the law rather than an interpretation of it.

3. Exceptions allowed to a general law are liable to a restricted construction, and the party claiming the benefit of any such exception must bring himself clearly within it.

4. In an appeal from a mercantile assessment the burden is upon the appellant.

5. The mercantile tax is levied upon a mode of doing business, and not upon the person or property.

6. A party, whether natural or artificial, is subject to the tax if he or it maintains a store or warehouse apart from the factory for the purpose of selling or vending goods. The license duty applies only to such dealers as are engaged in the sale of goods, or have a store or warehouse for that purpose. The mere maintenance of a warehouse apart from the factory is not sufficient to create the liability to mercantile tax where it is used for storage only and no sales are made in it or from it.

Taxation—Mercantile Tax—Distributing Stations of Oil Company—Act 2 May, 1899, P. L. 184.

7. Where a corporation engaged in manufacturing, refining and selling petroleum and its by-products maintains, apart from its factory, distributing stations to which its manufactured products are shipped and from which they are delivered to customers by motor trucks on orders and contracts solicited by salesmen and entered through the company's factory office by which all accounts are handled and no actual sales are made immediately at the distributing stations, such stations are separate warehouses for the purpose of vending goods of the corporation, and as such subject to license tax with respect to each one of them separately.

8. Products delivered or handled through such stations do not become the subject of barter and sale until they arrive there, and for the purposes of the Act 2 May, 1899, P. L. 184, the sale is accomplished from or at the place where they are so made available. The Act of 1899 requires the appraiser, when dissatisfied with the dealer's return, to estimate or appraise the gross volume of business done in order that he may ascertain and assess the tax and fix the amount of money to be paid.

In the Court of Common Pleas of Berks County.

No. 99 August Term, 1918.

Appeal from mercantile assessments.

Ira J. Williams for appellant.

R. G. Bushong for the Commonwealth.

Opinion by Endlich, P J., March 17, 1919.—This appeal from assessments of mercantile taxes was argued very elaborately and earnestly on both sides, and the statutory time-limit for a decision by the Court was waived by counsel.

The assessments resisted by the Atlantic Refining Co. and here involved were estimated assessments made by the Mercantile Appraiser in excess of the sworn returns made to him by the Atlantic Refining Co. There was an appeal by the same from these appraisements and assessments to the County Treasurer sitting with the Appraiser as a board, whose decision being adverse to the appellant company, the latter appealed to this Court.

The Atlantic Refining Co. is a corporation of the State of Pennsylvania engaged in manufacturing, refining and selling petroleum and its by-products. Its factories or refineries are at Philadelphia, Pittsburgh and Franklin, Pa., and the products passing through its hands in Berks county during the year 1917 were its manufactured products. The company maintains locations or so-called distributing stations in the county of Berks at Boyertown, Womelsdorf, Birdsboro, Hamburg, Kutztown and West Reading. With the exception of the last named, these stations are also designated as relay points. They are in each case situated along the main line of the Philadelphia & Reading Railway Co., and consist of two storage tanks with a pumping apparatus and loading lines to load the material from the tank cars directly into the storage tanks. The manufactured products of the appellant company are shipped by rail to these various stations, in bulk, in tank cars, from the factory or refinery at Philadelphia and sometimes from the refinery at Franklin, Pa. There is no display of goods at these stations; there is no office at any of them. With the exception of West Reading, which is concededly a point for selling gasoline, etc., and with the further exception of Kutztown, (to be more particularly adverted to hereafter), there are no facil-

ities for making sales at the stations, nor anybody in attendance at any time, either day or night, in behalf of the company. The product of the latter's manufacture is delivered to customers by motor trucks. The drivers of these trucks make their deliveries starting from West Reading. When the trucks run out of material, instead of returning to the starting point for a new supply, they go to the nearest relay point and there fill up. Salesmen of the appellant company travel throughout the county soliciting and obtaining orders and contracts for the company's products. They make daily reports to the factory office of all orders secured and contracts made for the sale and delivery of manufactured products, the written contracts providing for a minimum and maximum quantity of material for a definite specified period of time at a definite fixed price. Upon receipt of these contracts and orders, the factory office at Philadelphia directs delivery from the location or station nearest to the place of business of the customer to whom the delivery is to be made. The credits for the customer are fixed at the factory office at Philadelphia, and the factory office bills these customers. Payments are made by them directly to the factory office at Philadelphia, or at times to the drivers of the motor trucks, who, upon receipt of payments from customers, turn them into money orders daily and remit these to the factory office at Philadelphia. No actual, direct sales are made immediately at the relay stations at Boyertown, Womelsdorf, Birdsboro or Hamburg. At the station maintained by the company at West Reading, there are, in addition to the storage tanks, an office building with a clerical force and a service pump at the curb by which sales and deliveries are made at the station. At the Kutztown station it appears that there was an informal arrangement with a nearby business man by which through his voluntary services sales and deliveries could be made directly at the station and were so made from time to time. The drivers of the motor trucks not only delivered to persons who had contracts with the Atlantic Refining Co., but to such as had not, and also sold the material from the motor trucks to those who desired to obtain it. The Mercantile Appraiser and the board, consisting of himself and the County Treasurer, treated each one of the stations spoken of as separately requiring an assessment and licensing of the Atlantic Refining Co. It is of course from the decision of the board that the Atlantic Refining Co. has appealed to this Court.

There are some secondary questions suggested in this case which will be treated of hereafter. The principal question is whether, under the state of facts above indicated, the appellant is, in respect to any or all of the tank stations, liable to assessment and taxation under the mercantile license laws; and

that in turn depends upon the construction of those laws, understanding thereby, for present purposes, the Act 2 May, 1899, P. L. 184, together with the Acts 4 May, 1841, Sec. 10, P. L. 311, and 22 Apr. 1846, Sec. 11, P. L. 489, and the Act 27 Feb., 1868, Sec. 1, P. L. 43. The Act of 1841 ordains in Sec. 10, that "no person . . . who may vend or dispose of articles of his own growth, produce, or manufacture, shall be required to take out a license" The Act of 1846 enacts, in Sec. 11, that "mechanics who keep a store or warehouse at their own shop or manufactory, for the purpose of vending their own manufactures exclusively, shall not be required to take out any license." The Act of 1868, in Sec. 1, declares that "the true intent and meaning of the eleventh section of an Act . . . approved April 22, A. D. 1846, is . . . that a manufacturer or mechanic, not having a store or warehouse apart from his manufactory or workshop, for the purpose of vending goods . . . shall not be classified or required to pay the annual tax and license" And the Act of 1899 provides as follows:

"Section 1. . . . each retail vender of or retail dealer in goods, wares and merchandise shall pay an annual mercantile license tax of two dollars, and . . . one mill additional on each dollar of the whole volume . . . of business transacted annually. Each wholesale vender of or wholesale dealer in goods, wares and merchandise shall pay an annual mercantile license tax of three dollars, and . . . one-half mill additional on each dollar of the whole volume . . . of business transacted annually. . . ."

"Section 2. And . . . all persons who shall sell to dealers in or venders of goods, wares and merchandise, and to no other person or persons, shall be taken . . . (to) be wholesalers; and all other venders . . . or dealers . . . shall be retailers . . ."

The language of a taxing act is to be understood in its ordinary popular significance: *Deitz vs. Beard*, 2 W. 170, 172; *Spangler vs. York Co.*, 13 Pa. 322, 326; *Com. vs. Williamson*, 48 Pa. Super. Ct. 561, 564—unless something in the context, etc., shows it to have been used in another sense: see *Com. vs. Bailey, etc., Co.*, 20 id. 210, 215. Conceding further that the language of such statutes is to be strictly construed, yet the stringency required is not altogether like that controlling the construction of penal laws: *Bishop, Wr. L. Sec. 195*, but such as to effectuate the purpose of the enactment: *United States vs. Hodson*, 10 Wall. (U. S.) 395, without extending it beyond its natural meaning or so as to impose a tax by implication: *Poor Dir's vs. Sch. Dir's*, 42 Pa. 21, 25; (and see *Boyd vs. Hood*, 57 id. 98, and *Fox's App.*, 112 id. 337), or amount to an amendment of the law rather than an interpretation of it: see

Com. vs. Gouger, 21 Pa. Super. Ct. 217, 229. On the other hand, exceptions allowed to a general law are liable to a restricted construction: Ry Co. vs. Ry Co., 151 Pa. 138, 140; Com. vs. Cover, 29 Pa. Super. Ct. 409, 414, and the party claiming the benefit of any such exception must bring himself clearly within it: Conroy vs. Pittsburgh Times, 139 Pa. 330, 339; Com. vs. Marks, 248 id. 518; Coates vs. Wallace, 4 Pa. Super. Ct. 253. It has been held that in an appeal from a mercantile assessment the burden is upon the appellant: In re Horticultural Hall, 26 Distr. R. 988. Nor is it to be overlooked that, as pointed out in Com. vs. Atlantic Refining Co., 69 Pa. Super. Ct. 32, at p. 35, the tax is levied upon a mode of doing business, and not upon the person or property: Com. vs. Thomas Potter, Sons & Co., 159 Pa. 583; Knisely vs. Cotterel, 196 id. 614 (to which may be added Com. vs. Mfg Co., 48 Pa. Super. Ct. 474, 476). A party, whether natural or artificial, is subject to the tax if he or it maintains a store or warehouse apart from the factory for the purpose of selling or vending goods: Com. vs. Bailey, etc., Co., 20 Pa. Super. Ct. 210. The place of business must be permanent: Com. vs. American Tobacco Co., 173 Pa. 531. Moreover, goods must be sold in or from it: Com. vs. Campbell, 33 Pa. 380; Com. vs. Gillinder, 12 Distr. R. 635. "The license duty applies only to such dealers as are engaged in the sale of goods, or have a store or warehouse for that purpose." Com. vs. Teller, 144 Pa. 545. The mere maintenance of a warehouse apart from the factory is not sufficient to create the liability to mercantile tax where it is used for storage only and no sales are made in it or from it: *ibid.* At p. 549 of this case, however, the suggestion is thrown out that where a party is engaged in one county in making sales to be consummated by delivery from said warehouse in another county, a different question may be presented. And in line with this suggestion, in Com. vs. Atlantic Refining Co., 69 Pa. Super. Ct. 32, where the defendant maintained relay stations very similar to those maintained in this county, it is said at p. 35: "The goods delivered or handled through the station do not become the subject of barter and sale until they arrive there, and, for the purposes of the Act of 1899, the sale is accomplished from or at the place where they are so made available."

The application of these principles to the main question above stated as arising from the facts in this case leads to a result which seems neither doubtful nor unreasonable and which is reached by the Court of Common Pleas of Montgomery County in what is perhaps the most recent and closely fitting judicial utterance touching mercantile licenses, to wit, the Appeal of the Atlantic Refining Co., C. P. Montg. Co., No. 34 June T. 1918. Except for the fact stated by Judge Miller, who delivered the opinion, that the motor truck driver sells

to customers at the relay stations if they happen to call while he is there, it is impossible to find any difference between the facts of the case there passed upon and the one here for adjudication,—a difference which appears quite inconclusive when it is considered that the driver gets his supply from the tanks and sells it from his truck, whether near or far from the tanks. Says the learned Judge in the case referred to,—

“All merchandise forwarded by the appellant to any of the * * * stations is delivered there in bulk. There is no setting apart of goods, or identification of packages at the factory. When it arrives at the stations it is all still the property of the company.”

And further,—

It must be conceded that all of these * * * stations are distinct and apart from the factory * * * they all constitute stores or warehouses within the contemplation of the law. Can there be any doubt that all, under the same facts, are maintained by the appellant for the purpose of vending goods? They are surely not so maintained for their manufacture, their display, * * * or for their storage, as in a warehouse as that term is generally used and understood. There can be no other construction placed upon the testimony than that all of these stations are maintained by the appellant for the purpose of conveniently vending its goods, which do not become the subject of barter and sale until they arrive there.”

When it comes to the minor questions raised in this appeal, Judge Miller's decision disposes of them so persuasively and satisfactorily that little, if anything, can be profitably added to what he has said. The appellant has set up the contention that it is not liable to a separate assessment and payment of a separate mercantile license tax for each place of business within the county, but that only one fee can be exacted within the county. A like contention was made before the Montgomery Common pleas. Concerning it Judge Miller says:—

“The appellant * * * maintains ten stations in Montgomery County* * * It has been rated or classified as a wholesale and retail dealer at each one of these ten stations and it contends that this is error and that it should have been thus rated or classified but once for the whole county * * * If the appellant, on a single classification, can thus maintain ten places of business in the county it can, with equal propriety, maintain a hundred and pay for but one classification. This is not the correct construction of the Act, which was passed to raise revenue and which must be so construed that it will affect all uniformly. Otherwise, though the matter is small, it would be possible for the appellant, as a dealer in oil and its products, say at Norristown, to escape taxation to which its competitors would be subject.

"Although this is a tax upon business of a designated character and not upon property,—a tax levied on a mode of doing business and not upon the persons,—this principle of uniformity and the Act both require that the dealer and the place where he does business shall, in co-relation, be recognized in its imposition and collection. 'Each' dealer must pay. Upon refusal to make a return it is the duty of the county treasurer to require the owner or business manager to appear before him in person, with the books and accounts 'of his mercantile establishment.' The appraiser must make a personal visit to the store or other 'place of business' of every person whom he is required by law to ascertain and assess. * * *

"Each dealer must therefore be classified and his business must be appraised at each store or place of business he maintains."

The bearing upon the present case of what has been thus said in the Montgomery county decision is too self-evident to require elucidation.

That decision also negatives the position of the Atlantic Refining Co. there taken, as here, that the appraiser had no authority under the statute to make estimated assessments when dissatisfied with the returns made by the dealer. Says Judge Miller about the duty of the assessor in such circumstances under sec. 6 of the Act of 1899:—

"He must ascertain and assess the tax and fix the amount of license money to be paid. How he can do so without estimating or appraising the volume of business done is incomprehensible. All the appeal board itself can do under the wording of the Act is to find 'the proper classification' of the vender or dealer. We, therefore, hold consistently with the unquestioned practice for many years, that the Act of 1899 requires the appraiser, when dissatisfied with the return, to estimate or appraise the gross volume of business done in order that he may ascertain and assess the tax and fix the amount of money to be paid."

It may be noted that there is no proof before us of excessiveness or injustice in the assessments appealed from. Such fact, if a fact, could have been readily shown by the appellant. Its failure to show it is doubtless to be received as a confirmation of the presumption of substantial justice involved in what has already been intimated as to the burden of proof resting upon the appellant.

The conclusion is that, so far as the station at Kutztown is concerned, there can be no doubt of the Atlantic Refining Co.'s liability to the mercantile tax demanded for that station, and that as to those at Boyertown, Womelsdorf, Birdsboro and Hamburg, they must be held under the statute to be separate warehouses for the purpose of vending the Atlantic Refining Co.'s goods, and as such subject to license tax with

respect to each one of them separately. So far as the West Reading station is concerned, there can be no serious dispute as to the Atlantic Refining Co.'s liability. It follows that—

The appeal is dismissed.

SAMET vs. IMBER BROTHERS

Workmen's Compensation—Appeal From Referee's Decision—Findings of Fact—Practice.

A claim for payment under the Workmen's Compensation Act will, on appeal to the Common Pleas, be referred back to the referee where the findings of fact do not specifically show what the claimant was doing at the time of injury.

In the Court of Common Pleas of Berks County.

No. 67 October Term, 1918.

Appeal from Workmen's Compensation Board.

C. H. Ruhl for defendant and appellant.

J. B. Stevens for plaintiff.

Opinion by Wagner, J., April 14, 1919.—Plaintiff claims payment under the Workmen's Compensation Act from the defendants upon the ground that on April 17, 1917, while she was employed in the regular course of business of the defendants she sustained an accident. The defendants have appealed contending that at the time the accident occurred she was not engaged in work for them.

In plaintiff's Claim Petition (sixth question) we have:

Q. "What kind of work were you doing at the time of the accident?"

A. "Was going to lunch."

Defendants contend that upon the facts as stated in her petition she was not in the course of her employment when the accident occurred.

The determination of this matter, therefore, depends upon what plaintiff actually was doing at the time the accident occurred. In the Referee's Findings of Fact, on this point, we have:

"(a) That Florence Samet, on April 17, 1917, was employed as saleslady, in the regular course of the business of Imber Brothers, Reading, Penna.

"(c) That claimant, Florence Samet, on April 17, 1917, in the storeroom of defendant, while descending steps from cloak room, fell on said steps and sprained her hip and back, resulting in dislocation of sacro-iliac joint on left side."

It will be seen from "a" that that finding is not specific enough in that while on April 17, 1917, she may have been employed as there stated, yet at the particular time at which the accident occurred she may not have been in such employment. It is also equally true, as shown in Finding of Fact "c" that she on that day may have been in the store room of defendants, descending from the cloak room, and yet at the time not have been in their employ. It is consequently necessary that there be a specific finding from the evidence what she was doing at the precise time that the accident occurred, to determine whether the referee's conclusion of law is correct.

The case is, therefore, referred back for further findings of fact and determination.

SCHWEYER, EXECUTOR, vs. HIGH

Assumpsit—Conflict Between Oral and Written Evidence—Question for Jury.

The finding of a jury that money paid by a decedent to his daughter was a loan and not a gift will not be set aside where the oral evidence submitted is contradictory, and such oral evidence is sufficient to overcome a written statement declaring the payment to be a gift alleged to have been signed by the decedent, the authenticity of which appears on its face to be doubtful.

In the Court of Common Pleas of Berks County.

No. 88 August Term, 1918.

Assumpsit. Trial and verdict for plaintiff for \$575.

Rule for judgment n. o. v.

Randolph Stauffer for defendant and rule.

H. J. Dumn, contra.

Opinion by Wagner, J., April 14, 1919.—Plaintiff brought suit against the defendant for two items of money which he contended had been borrowed by defendant from Levi A. Schweyer during his lifetime. The jury brought in a verdict in favor of the plaintiff for one of these items, to wit, \$575, with interest thereon.

It was admitted by Mrs. High, defendant, that Levi A. Schweyer, on May 9, 1918, gave her a check for \$575 and that this money on this check was received. She defended on the ground that this money was not a loan but a gift given by her father to her son, Star High, a boy 17 years old, for the purpose of applying it towards the purchase of an automobile. The evidence to prove that this was a loan and not a gift consisted

of the testimony of Eugene B. Schweyer and Mrs. Lizzie Graul. He said that between June 10 and 12, 1918, he had a conversation with his father in the presence of Mrs. High. That the father then said to him that he had given to her \$575 as a loan because (N. of T. p. 3) "they wanted to buy an automobile, and they were short in money, and he gave her the money under these conditions, that she should pay it back to him, as a loan he gave to her." His testimony further is:

"Q. What did she say when your father said she owed this money? What did she say? A. It has to be paid back."

Mrs. Lizzie Graul, a daughter of deceased, testified that she visited her sister, the defendant, with whom the father was staying, about June 1, 1918. That there, in the presence of the defendant, the father cried bitterly and told her that he had given them (defendant) \$575 for a loan to buy an automobile and that he was half owner of the automobile. That when the father said this the defendant "ran her fist up against my fathers nose . . . because she didn't want my father to tell me anything." This evidence, if believed by the jury, would be sufficient to warrant a finding that the money in dispute was given to her as a loan. She denied this and stated that the check was given to her for the purpose of giving the money to her son, which he was to apply towards the purchase of an automobile. In this she was corroborated by her son. Defendant also denied the conversations testified to by Eugene B. Schweyer and Mrs. Graul. Had the case depended for determination upon this contradictory oral evidence, it is clear that its determination was for the jury: *Grange Trust Co. v. Brown*, 49 Pa. Superior Ct., 274, 281; *McGlinn Distilling Co. v. Dervin*, 260 Pa. 414.

But in addition to defendant's evidence already noted, she produced a written statement, the body of which she admitted was in her own handwriting. Counsel for defendant asks that judgment be given principally on account of this written statement, contending that the oral evidence that this was a loan was not sufficient to overcome this written evidence. The statement is as follows:

Bernhardts. Pa., May 9th, 1918.

I give to my Grandson Star H. High \$575 or five hundred and seventy five dollars as a present towards the purchase of an automobile absolutely for Star H. High.

(Signed) Levi A. Schweyer.

Defendant was the only one who testified that she saw the deceased attach his signature. The son testified that as soon as he received the check he went downstairs and that he did not see the paper signed. Both the check and the statement were offered in evidence. The defendant testified positively that the two were signed at the same time; that is, first the check and then afterwards the statement to explain the

check. If such were the case one would naturally expect the signatures to be practically the same. When you examine the signature on the check it is at once evident that it is that of a person whose handwriting is not yet affected by weakness. The handwriting is not that of a trembling, nervous hand. When, however, you look at the statement signature, you at once recognize the hand as that of an extremely nervous and trembling person. Consequently when the defendant testified that the check and statement were signed at the same time, and we find this change in physical condition as clearly indicated by the signature, the only conclusion we can come to is that this statement must have been procured from the defendant, not upon the day that he signed the check, but upon some later date when his powers of signature were greatly impaired. This at once casts suspicion upon the written statement. This signed statement, therefore, does not possess the evidential value that it would have were this mark of suspicion not stamped upon its face. Her father was taken to the hospital on June 12, 1918, where he died on July 6. at the age of 79 years. Under the evidence the controversy relating to the \$575 cannot be determined as a matter of law.

Rule for judgment n. o. v. discharged.

MACHAMER vs. DAVIS

Negligence—Master and Servant—Defective Appliances—Stepladder—Inspection—Case for Jury.

1. The duty of the employer to furnish his servants with reasonably safe tools and appliances with which to work is an absolute one from which nothing but performance will relieve the employer.

2. The continuing and bounden duty of the employer is not only to furnish a reasonably safe place for his servants to work and reasonably safe machinery and appliances, but also to use reasonable care to keep such place and such instrumentalities in a reasonably safe condition, and this is to be accomplished only by a proper and timely inspection so as to ascertain defects, if any, and repair them.

3. In an action to recover damages for personal injuries sustained by a house-cleaner resulting from a fall from a stepladder upon which she was working while in defendant's employ, the case is for the jury and a verdict for the plaintiff will be sustained where the ladder given to plaintiff by defendant to use was thirteen years old; that three or four years prior to the accident the brace that held the ladder together broke and was replaced by a piece of rope with defendant's knowledge; and that while the plaintiff was using the ladder the rope broke because of its rotten condition, causing the ladder to collapse and the plaintiff to fall.

In the Court of Common Pleas of Berks County.

No. 121 August Term, 1918.

Trespas. Trial and verdict for plaintiff for \$501.

Rule for judgment n. o. v.

E. H. Deysher for defendant and rule.

J. H. Rothermel and W. B. Bechtel, contra.

Opinion by Wagner, J., April 14, 1918.—Plaintiff brought this action for damages charging that the defendant was negligent in furnishing her a stepladder that was not safe, when, on April 17, 1918, she was in her employ to do house-cleaning work. It was alleged that the rope which connected the two uprights of the ladder broke because it was in a rotten condition, thus causing the uprights to part, the stepladder to fall, and thereby injured plaintiff who was then using it.

Defendant testified that she had owned this stepladder for at least 13 years prior to the time of the accident. That about 3 or 4 years before this the brace that held the ladder together broke and that then this piece of rope was substituted for the brace, and that she knew of this substitution. Plaintiff testified that the defendant had told her to get and use the stepladder when she started to work on April 8 and that from that date until the day of the accident she used it whenever it was necessary to do so. There is no question but that the accident occurred because of the rotten condition of this rope. When defendant, as employer, gave this stepladder into the hands of her servant to use, it was her duty to see that it was reasonably safe for the purposes for which it was to be used. In *Garrison v. Armstrong & Co.* 248 Pa. 402, at p. 405, we have: "This duty is an absolute one from which nothing but performance will relieve the employer—*Carr v. General Fire Extinguisher Co.*, 224 Pa. 346; *Killmeyer v. Forged Steel Wheel Co.*, 243 Pa. 110." In *Ready v. Smith & Furbush Co.*, 51 Pa. Superior Ct. 294, it is stated (p. 297): "The duty to furnish proper tools is an absolute one of which the employer cannot be relieved by delegating it to another, and he must see to it at his peril, that the duty is performed."

The rope was an ordinary one about one-half of an inch in thickness. Defendant testified that she did not know where it came from and never took the trouble to find out whether it was an old or a new rope. That she simply took the rope without examining into its strength or quality and thus used it as a substitute for a brace. That she did not examine the rope from time to time to see if it was in proper condition. That she did not know whether it was an old or new rope that had been placed there three or four years before. In *N. of T.*, p. 30, we have:

"Q. In other words, you didn't concern yourself about this rope, did you? A. Well, I didn't think it was necessary. I thought the party using it would see to it."

That is, she imposed upon the servant the duty of inspection which should have been performed by her. Defendant testified that this ladder when not used was kept in the cellar. In *Baker v. Allegheny Valley Railroad Co.*, 95 Pa. 211, the Supreme Court says (pp. 215, 216): "The Master is bound to know that a rope under such circumstances will only last a limited time. It will not do for him to furnish a sound rope and then fold his arms until by actually breaking it is demonstrated to be insecure. It will not do to say that the servant is bound to know this as well as his master, and to warn him that after such a time he ought to procure a new rope. Is the servant bound to notify the master of that which he knows or ought to know himself without such information? He knows how long the rope has been in use. The servant may not know." See also *Eldridge v. Fell Mfg. Co.*, 240 Pa. 321, 327. The plaintiff had not used the ladder from the Spring of 1917 until April, 1918. In *Leonard v. Nazareth Cement Co.*, 49 Pa. Superior Ct. 535, at 540, we have: "The continuing and bounden duty of the employer was, not only to furnish a reasonably safe place, *Welch v. Carlucci Stone Co.*, 215 Pa. 34, and with reasonably safe machinery and appliances, but the law imposes upon him the further obligation of using reasonable care to keep such a place and such instrumentalities in a reasonably safe condition, and this is to be accomplished only by a proper and timely inspection, so as to ascertain defects, if any, and repair them, *Finnerty v. Brunham*, 205 Pa. 305." Defendant's negligence, from her own evidence, is, therefore, plain.

Defendant relies principally in her motion for judgment n. o. v. upon the fact that the rotten condition of this rope was so apparent that it brought home to plaintiff knowledge of its condition, and that consequently she was guilty of contributory negligence. When the stepladder was given to plaintiff she had a right to assume that it was safe. "The plaintiff had the right to assume that the machine was a reasonably safe one: *Burt v. Jessup Steel Co.*, 229 Pa. 562; *Reed v. American Dyewood Co.*, 231 Pa. 431; *Bardsley v. Gill*, 218 Pa. 56;" *Leonard v. Nazareth Cement Co.* supra, p. 542. Also in *Eldridge v. Fell Mfg. Co.*, supra, Mr. Justice Mestrezat says (p. 327): "The plaintiff could assume that his employer would take the necessary precaution to keep every part of the machine in a reasonably safe condition, and he had the right to act upon that assumption."

The plaintiff testified that she had not inspected the rope and did not know that it was not safe. She had used it at different times from April 8 to April 17. Defendant testified that her son had used this same stepladder on the Saturday previous for the purpose of hanging up pictures in the dining room and side room. Defendant sat by when the ladder was

used and by casual observation evidently did not see the dangerous condition of the rope. She testified that she was just inside the door at the parlor when the accident happened. This evidence shows that the rotten condition of this rope was not so apparent as to convict plaintiff of contributory negligence. In *Smith v. Standard Steel Car Co.*, 262 Pa. 550, on page 555, it is stated: "Where the issue of contributory negligence has been submitted to the jury, a finding in favor of the plaintiff will not be set aside, unless, upon a review of the evidence in the light most favorable to the plaintiff, it is inconceivable that a mind, desiring only a just and proper determination of the question, could reasonably reach any other conclusion than that the plaintiff had brought about or contributed to the injury by his own carelessness—that is, after determining all doubts and drawing all inferences in favor of the plaintiff, it must be clear that he was guilty of contributory negligence before it can be so ruled as a matter of law" (*Cramer v. Aluminum Co.*, 239 Pa. 120, 125)." The evidence shows that after the accident the rope "was in strings, it was all broken, and all brownish, looked brownish." In *Porter v. Wilson*, 62 Pa. Superior Ct., 339, 342, we have: "That the rope was unfit for the use to which it was applied is established by the accident; that it was an old rope is not disputed; nor is there reason to believe that by a proper inspection its condition would not have been disclosed." We consider that all the questions that arose in this case were for the jury.

Rule for judgment n. o. v. is discharged.

FIDLER vs. FIDLER

Practice C. P.—New Trial—Contradictory Evidence—Question for Jury—Error in Amount of Verdict—Remittitur.

1. A new trial will be refused where the evidence, although contradictory, is sufficient to support the verdict.
2. An obvious error in the amount of a verdict will be remedied by ordering a remittitur.

In the Court of Common Pleas of Berks County.

No. 49 May Term, 1918.

Assumpsit. Trial and verdict for plaintiff for \$3913.75.

Rule for new trial.

C. H. Ruhl for defendant and rule.

H. Robert Mays and H. P. Keiser, contra.

Opinion by Wagner, J., May 5, 1919.—The plaintiff is the divorced wife of the defendant. In this action she brought suit against her former husband for the recovery of \$5600. This amount is made up of various items. The first is an item of \$4000 which she claims was due to her under these alleged facts: Her father at the time of his death on February 26, 1909, was the owner and proprietor of a hosiery mill. Under his last will and testament the plaintiff was the sole legatee. Her contention was that at the time of the death of her father the value of the manufactured goods, raw material, and machines was \$1885. She alleged that this business was carried on for her, was her business, and that when defendant disposed of the business after their divorce, he realized therefrom \$4000 which he appropriated to his use. She also claimed \$200 as the value of a buggy and a horse, which she stated was purchased with her money, but which had been sold by defendant and the money retained by him. She further contended that she had loaned to her husband various sums of money, as evidenced by checks, amounting to \$300. Also that he had collected the proceeds of the Degler mortgage, which was her property, and of this sum appropriated to his own use \$1000. The last item was for \$100, which plaintiff alleged was given by her to him to have, with \$100 of his own, invested in a \$200 mortgage. The jury found a verdict in favor of the plaintiff for \$3913.75.

The largest item was that which arose under plaintiff's claim of ownership of the hosiery business. She testified that her husband had run the business for her. His testimony was that it was his business and not hers. The only other testimony bearing directly upon this was the evidence of defendant's cousin, who stated that upon several occasions the plaintiff had said to him that the business was that of her husband. This the plaintiff denied. The husband testified that the letter heads and stationery were in his name. Charles P. Schaeffer, the Cashier of the Womelsdorf Union Bank, stated that during the entire period of the running of this business they frequently had notes discounted at the bank. That although the bank knew them to be husband and wife, nevertheless upon the joint note of the husband and wife they discounted these notes knowing at the time that the proceeds of the notes went into the business. She testified that she objected to the manner in which he ran the business; that they had "fights" about it, and that what she said did not count for much. When the daughter was questioned by defendant's counsel (N. of T. p. 59), we have, on this subject:

"Q. Why did your mother permit him to do all the business, give him all the cash to pay these bills, if he was such a man? A. Well, because if he didn't get it, he would beat her and pound her until he got it."

The item of \$200 for the horse and buggy depended upon the jury's finding whether or not they were bought with the proceeds of the business and whether the business belonged to the plaintiff.

The item of \$300 was proved on the part of the plaintiff by the production of four checks totalling this amount. His testimony was that this money had been paid back by him. He did not produce any receipts therefor.

The \$100 item that plaintiff alleged she had given to him to invest in a mortgage of \$200, with \$100 of his money, he contended at the time of the trial that he had repaid, stating the time and the manner of payment.

Whether or not plaintiff was entitled to a verdict against the defendant depended largely upon whether the jury believed the evidence of the plaintiff or the evidence of the defendant, as they were the sole witnesses to a number of the matters that arose in this action. In passing upon their credibility the jury was aided by their manner of testifying. They were also further aided by the contradictory and impossible statements made under oath. The defendant in his affidavit of defense to plaintiff's statement that he had continued the hosiery business as his wife's business, swore that whatever personal property was there at the death of her father was presented by the plaintiff to him. That is, he positively swears that it was a gift to him by the plaintiff. At the trial, however (N. of T., p. 33), he abandons this defense of a gift and claims that he received the goods from his wife upon an arrangement that he was to make certain repairs to her house, and then testified that he had made repairs to the extent of \$2300. He then asked to have his affidavit of defense amended so as to be able to prove this defense, not of a gift, but the receipt of the goods from the plaintiff for a valuable consideration.

Thomas E. Haak, a Justice of the Peace of Womelsdorf, testified that the defendant had come to him and stated that he had some money that he wanted to put out on interest and that he had made the arrangements for the \$200 mortgage. That shortly after that, when he, Mr. Haak, had a person who wished to borrow \$200, defendant said to him that he did not have the \$200, that he had only \$100 and that he had to get \$100 from his wife. His wife testified that the \$100 was given to him by her for the above purpose. Confronted by this strong evidence of the receipt of the \$100 by the defendant as alleged in Paragraph 8 of plaintiff's statement, the defendant abandoned his defense as set forth in the affidavit of defense on this item, wherein, in Paragraph 8, he "denies that he received the sum of money, or any part of it, described therein." In place thereof he admits the receipt and sets up the defense of payment. He again moved to amend the affidavit of defense

to enable him to introduce this defense of payment. We consequently here again have two directly contradictory averments. The first affidavit of defense, no receipt; the second affidavit of defense, the admission of the receipt of the \$100, but payment in manner as he testified. He testified that this \$100 had been repaid to his wife on March 29, 1911, when there was transferred to his wife a mortgage for \$1300 and that this \$1300 mortgage was made up of \$200 cash received from her, two notes of hers of \$500 each, and this \$100. The wife and the daughter both positively testified that the \$1300 was made up by a check from the plaintiff to her husband of \$500, of cash payment by her of something over \$700, and that the daughter to make up the balance gave her check, out of her savings, for \$87.25. This check (Exhibit "F") dated March 25, 1911, was offered in evidence. It was also clearly shown that the \$200 mortgage, in which the wife had the \$100, was not paid until 1917. It was therefore impossible for the husband in 1911 to have received this money and to have applied it to the Behney mortgage of \$1300, since the \$200 mortgage was not paid off until six years later. Plaintiff's and defendant's credibility was plainly for the jury, and under defendant's contradictory affidavits and testimony the jury was warranted in determining this question in favor of the plaintiff.

Defendant's fourth reason for a new trial avers a duplication of items in Paragraphs 3 and 4 of plaintiff's statement. We did not so understand the statement nor was the case tried on that basis. Paragraph 3 of the statement merely sets forth the value of the business at the death of plaintiff's father. Paragraph 4 then makes a demand for that value which the defendant received for the business at the time that it was closed out. That is, plaintiff in her demand does not ask for both the value at the time of her father's death and the value of the business when sold by the husband, but only for that value when sold by the husband to which she claims it had then increased and which he had received.

The item of \$1000 consisted of two notes. Mr. Schaeffer (Cashier, Womelsdorf Union Bank) showed that this money went into the business, which she claimed was her own. Therefore, when she paid off these two notes with \$1000 which she realized from her Degler mortgage, she was merely paying off her own indebtedness and is consequently not entitled to recover under this item. At the time of the trial this duplication of \$1000 escaped the attention of the court, counsel for both parties, and consequently must be presumed to have escaped the attention of the jury and that its verdict includes this \$1000 duplication. This, however, should not require a new trial, as it can be corrected by the plaintiff remitting \$1000, the amount of the duplication.

It is therefore ordered that the rule for a new trial be made absolute at the expiration of 15 days from this date, unless plaintiff shall within that time, by paper filed, remit from the amount of the verdict the sum of \$1000, so that the verdict be for \$2913.75 instead of \$3913.75. If the plaintiff shall in manner as aforesaid file her remittitur, the rule will be discharged and judgment directed to be entered in favor of the plaintiff for the sum of \$2913.75, with interest from January 18, 1919, the date the verdict was rendered.

BECHTEL'S ESTATE

Wills—Testamentary Capacity—Issue Devisavit vel non—Evidence.

In deciding the question whether such a substantial dispute as to the testamentary capacity of the testator has arisen as to warrant a submission of it to a jury, the Court sits as a chancellor and must consider the entire evidence. In such a case the question is not whether some of the testimony, standing alone, would justify a verdict, but whether it would, considered as a whole.

In the Orphans' Court of Berks County.

In the matter of the petition of Judith Buchert, et al., praying for a citation to show cause why an appeal should not be allowed from the decision of the Register, admitting to probate the last will and testament of the decedent.

H. Robert Mays and Lloyd M. Schaeffer, for the petitioners.

Harry J. Dumn, contra.

Opinion by Schaeffer, P. J., May 16, 1919.—Gehret Bechtel, the decedent, died July 9, 1918. On March 9, 1918, he executed a paper purporting to be his last will and testament, wherein he made a number of small bequests to different parties and bequeathed the residue of his estate—total value about \$1,500.00—to Richard Bechtel and Annie Buchert. The will was probated on the 24th day of July, 1918, and an appeal admitting the alleged will to probate was taken on September 23, 1918, by Judith Buchert, Lydia Buchert and John Bechtel, sisters and nephew, respectively, of the defendant. The Court is requested to direct an issue to the Court of Common Pleas to determine the questions, whether or not (1) the decedent was of sound and disposing mind, memory and understanding at the time of the execution of the will; and whether the alleged will was procured by undue influence. The question for our consideration is, whether upon the testimony presented by the respective parties such a "substantial dispute" as to the

testamentary capacity of the testator and the exertion of undue influence has arisen, as to warrant a submission of it to a jury.

The rule in such cases is well settled: "If the testimony is such that, after a fair and impartial trial, resulting in a verdict against the proponents of the alleged will, the trial judge, after a careful review of all the testimony, would feel constrained to set aside the verdict, as contrary to the manifest weight of the evidence, it cannot be said that a dispute, within the meaning of the Act, has arisen. On the other hand, if the state of the evidence is such that the judge would not feel constrained to set aside the verdict, the dispute should be considered substantial, and an issue to determine it should be directed": *Knauss's Appeal*, 114 Pa. 20; *Donneley's Estate*, 227 Pa. 609; *Schweitzer's Estate*, 228 Pa. 231; *Phillips' Estate*, 244 Pa. 35; *White's Estate*, 262 Pa. 357-359.

The authoritative test, therefore, is whether upon all the testimony, a verdict against the proponents of the will should be allowed to stand; and if such a verdict ought not to be allowed to stand, an issue ought not to be awarded: *Donneley's Estate*, *supra*.

In determining the question, whether we should sustain a verdict against the will under the testimony, we must keep in mind the meaning of testamentary capacity. What constitutes testamentary capacity has been laid down so often and in so many cases, that it is virtually needless to cite authorities. "A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in; the full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the recipients of his bounty": *Wilson vs. Mitchell*, 101 Pa. 502; *Smith's Estate*, 250 Pa. 87. If, from any cause, an alleged testator is so enfeebled in mind as to be incapable of knowing the property he possesses, of appreciating the effect of any disposition made by him of it, and of the distinctly understanding to whom he intends to bequeath it, he is without the testamentary capacity required to make a will: *Leech vs. Leech*, 21 Pa. 69. But "if he understands, in detail, all he is about, and chooses, with understanding and reason, between one disposition and another, it is sufficient": *Daniel vs. Daniel*, 39 Pa. 208.

We must remember that neither age nor sickness, nor extreme distress, nor debility of body, will affect the capacity to make a will, if sufficient intelligence remains. The failure of memory is not sufficient to create the incapacity, unless it be total, or extends to the immediate family and property: *Wilson vs. Mitchell*, *supra*.

"Testamentary capacity is the normal condition of one of full age, and the affirmative is with him who undertakes to

call it in question, and this affirmative he must establish, not in a doubtful, but in a positive manner:" *Grubbs vs. McDonald*, 91 Pa. 236. It is, therefore, proper to start with the presumption that testator was of sound and disposing mind, sanity being the normal mental condition, and such *prima facie* "can only be overcome by clear, definite, circumstantial and weighty evidence of facts, not reconcilable with the possession of testamentary capacity:" *Morgan's Estate*, 219 Pa. 355.

With these legal principles in mind, we must determine whether the testimony presented by the respective parties raises such a substantial dispute, as to the testamentary capacity of the testator, as requires us to submit it to a jury, for solution.

Gehret Bechtel was about 64 years of age at the time of his death and was unmarried. He resided on a small farm in Pike Township, said County, for many years. He and his brother Henry resided here together, with the housekeeper, Annie Buchert a niece of the decedent, and one of the residuary legatees. The evidence produced at the hearing by the contestants shows that the decedent had two paralytic strokes and was feeble and unwell for some years. A number of witnesses were called, who testified that the decedent acted in a peculiar manner, and that his conduct indicated that he was mentally irresponsible and physically weak. William Kaiser, one of the subscribing witnesses, testified that he was called into decedent's house when the will was drawn, that he saw decedent make his mark, but that the will was not read to the decedent in his presence and that he, the witness, did not know what the instrument was. When the will was probated he made the usual affidavit as to his witnessing the signature of the decedent. On the hearing of this application he tried to impeach the validity of his acts by saying that he did not understand the true purport of them, and that in his opinion the decedent was "not in his right mind." He testified further, that the decedent at times had to be led around in the house, from the woodchest to table, that his manners at the table were very bad and filthy, that his conversation was disconnected, and that his enfeebled condition and strange conduct indicated that he was mentally weak. The testimony of this witness, in our opinion, would have little weight with the jury, in view of the fact, that the witness, witnessed the signing of the will, joined in the probate of it, and apparently only discovered that the testator lacked testamentary capacity, when this contest arose. Horace Miller testified to a number of peculiarities of the decedent, viz: that when spoken to he would walk away without giving an answer, that he would rub his shoes, that when he wanted to go through a doorway, he would open the door and fall into the room, and that this conduct showed "that the decedent was not quite the way he

ought to have been" and was unable to transact his own business. On cross-examination the witness admitted that he never had any business transactions with him, and never saw any business done with him, and that some of his conversation was all right. Lydia Kepner, Abraham S. Bechtel, Sarah Harner, Alexander Buchert, all testified to same effect, viz: that the decedent was very peculiar, that he could not carry on a connected conversation, that he was unable to do his own business, and that he was not competent to make a will. Three of the aforesaid witnesses are relatives of the decedent and are interested in the result of this controversy. An examination of the testimony of Lydia Kepner and Sarah Harner shows that what they said relating to the conduct of the decedent, happened years prior to the execution of the will. Where a will is attacked on the ground of lack of testamentary capacity, the inquiry must relate to that period of time when the will was executed, published and declared: *Watmough's Estate*, 258 Pa. 22.

The contestants also offered in evidence the record in No. 31 March Term, 1918, wherein the Court of Common Pleas entered a decree declaring the decedent a weak-minded person and appointed Richard Bechtel, as his guardian. This proceeding was instituted a year after the alleged will was made. One of the witnesses, Morris Fretz, called at the hearing stated that the decedent's mind was "affected" for about three years. At the hearing in the case at bar he was present in Court, but was not called by the contestants. Dr. Clouser's testimony cannot be considered because it is too remote from the time the will was made.

The proponents of the will have shown that it was written by P. H. Brintzeghoff, a Justice of the Peace, who knew the decedent for thirty-five years. Squire Brintzeghoff testified, that he saw and talked with the decedent upon numerous occasions on or about the time the will was made; that he went to the decedent's home in pursuance to a request to come to see him made by decedent to a neighbor; that decedent outlined the provisions of his will to him in the most comprehensive manner, giving as his reason for remembering the particular legatees and excluding some of his collateral relatives that the people who did his work and took care of him, should receive his small estate. Mr. Brintzeghoff also testified, that the decedent also explained to him why he was anxious that certain relatives should not have anything out of his estate, and what his reasons were for remembering those that were named in the will. It appears from the testimony that when his brother Aaron Bechtel's estate was settled, some of the heirs objected to the erection of a tombstone, and at first refused to allow anything for it. It seems that this conduct in addition to the fact that he was more kindly disposed toward

his niece Annie Buchert, the housekeeper, and one of the residuary legatees, who bestowed care and attention on him, and his other relative, Richard Bechtel, explains why he made his will. Squire Brintzeggoff says that the decedent was competent to make his will, that his conversation was intelligent, that he knew what estate he possessed, who the objects of his bounty were, and that while his physical health was impaired, yet mentally he was all right and knew what he wanted to do with his property and to whom it was to go, when he directed him to write the will. Ellis Yoder, sixty years of age, a neighbor of the decedent, and a director in the Boyertown Bank, testified that the decedent came to him frequently and asked him to make deposits for him at the bank, which was some miles from decedent's home; that decedent always counted the money before giving it for deposit, which at times amounted to a few hundred dollars; that he transacted business with him at Yoder's mill, when he came there with a two horse team for milling products, at different times; and that his conversation was all right and his actions were normal and rational. The witness, Yoder, transacted business for him as late as July, 1917, about three months after the will was made, and said that his mind was all right. Jacob Yoder, another disinterested witness, and no relative of the decedent, testified that he had business dealings at his father's mill with decedent many times, that the decedent knew money, would converse rationally and intelligently and that he saw him a month or so before the will was made and that he was all right mentally. Charles Shade a disinterested witness testified, that he knew the decedent since boyhood, that he often met him at the mill and store, conversed with him, saw him in March 1917, when the will was made, saw him make purchases and pay for them, and that in his opinion he was mentally capable of making a will. Benjamin Rohrbach, the barber, who shaved the decedent, three and four times a month, Horace Bechtel, Benjamin Yoder, Charles Biehl the blacksmith, who shod horses for the decedent, which he brought to the shop, Amandus Haas, Peter Bechtel and Annie Buchert, all testified that the decedent, while weak and sick in body at times, was in absolute possession of all his mental faculties and competent to make his will. These witnesses for the proponents are all disinterested with the exception of Annie Buchert, the housekeeper, and niece, whose testimony and manner on the stand had a ring of sincerity and truthfulness in it, which carried conviction and which can hardly be ascribed to prejudice or interest.

Considering this case, therefore, upon the testimony of the disinterested witnesses, it is in favor of the mental capacity of the testator. While there is some conflict in the evidence, that for contestants is not sufficient to overcome the presump-

tion of testamentary capacity, supported as it is by clear and abundant affirmative evidence. In a case like the one at bar the Court sits as a Chancellor and must consider the entire evidence, and the question is not whether some of the testimony, standing alone, would justify the verdict, but whether it would, considered as a whole: *Keller, Appellant, v. Lawson*, 261 Pa. 489. Moreover, the will itself, with the oral testimony completely rebuts the allegation of testamentary incapacity; *Roberts v. Clemens, Appellant*, 202 Pa. 198.

The residuary legatees were very kind to the decedent. Annie Buchert, the niece, kept house for him and helped him and attended to him in his almost helpless condition. What more natural thing could the decedent do than to reward and remember those who had befriended him in life?

There is no evidence of any undue influence in this case; and this allegation was not pressed at the argument.

The facts proving the testator's soundness of mind are so conclusive, while the opinions to the contrary are founded on facts so insufficient, that we do not see how a Court could permit a verdict against the will to stand.

We cannot, therefore, say that a serious dispute has arisen as to the testamentary capacity of Gehret Bechtel, and we must refuse to direct an issue to the Common Pleas as requested.

And now, to wit: May 16, 1919, the decision of the Register admitting the will to probate is sustained and the appeal is dismissed.

BERTOLET'S ESTATE

Wills—Construction—Heir-at-Law.

1. An heir is not to be disinherited except by express devise or necessary implication.

2. Where in the primary division of his estate the testator excludes a daughter by a special bequest "as her share," and in the secondary division creates a trust fund for a son with remainder "to my other heirs" share and share alike, the daughter falling within the language of the gift, is entitled to participate in the distribution.

In the Orphans' Court of Berks County.

The account of Israel M. Bertolet, Trustee.

Samuel E. Bertolet, for the accountant.

Opinion by Schaeffer, P. J., May 31, 1919.—The decedent died, testate, on the 18th day of January, 1894. By his last will and testament, testator disposed of that part of his estate embraced in the account as follows:

"Item: That my son Amos may be provided with an income to maintain and support him during his natural life. I hereby direct my hereinafter named executors to set apart the sum of four thousand (\$4000.00) dollars in the hands of Israel M. Bertolet of Oley Township as trustee who is to safely invest the above named sum at interest at such a rate as can be gotten, and either pay the same or as much as may be needed thereof to him or to the persons or person with whom he may reside; and if in the judgment of the said trustee the interest not being sufficient he may use a small amount annually from the said principal sum of \$4000.00 for his (Amos) support, and whatever remains after the decease of my said son Amos it shall be distributed to my other heirs share and share alike by the above named trustee."

Amos B. Bertolet, cestui que trust, died January 17, 1919; and the trust for his benefit having been terminated, the trustee has filed this account. It contains the principal fund, and income accrued before and after the life beneficiary's death. Of principal, the balance for distribution is shown to be \$3,690.00, and of income, \$123.13. For the purposes of this distribution, these funds may be blended . . . The only other matter concerns the right of Catharine B. Baer, one of testator's children, to participate in the distribution of the fund. Directly following that item of the will controlling the disposition of this fund, there is another one in which testator gave his daughter, Catharine, a special legacy of \$100.00 "as her share; she having during my lifetime received from me a large sum of money . . ." Further, by a codicil to his will, he apparently attempted to cut this legacy down to \$5.00, "as her full and complete share of my whole remaining estate . . ." The question raised, therefore, is, whether in view of these provisions, the daughter, Catharine, is not debarred from receiving a share of the fund now to be distributed.

The significant features of the will, as relating to the question raised here, are, first, that in the item creating the trust estate and disposing of the remainder after the life beneficiary's death, Catharine B. Baer, the daughter, is not expressly excluded from the class of "my other heirs," who take the fund, and, second, as a consequence of this omission to exclude her, a doubt is raised as to whether or not testator intended her to come in on the fund. In these circumstances, we think we can do not better than to quote from Croll's Estate, 26 D. R. 873, a case of much the same character: "It is fundamental," the Court said, "that an heir is not to be disinherited except by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed: Bender v. Dietrick, 7 W. & S. 284; Bruckman's Estate, 195 Pa. 363. Every intendment must be made in favor of an equality

of division; in other words, the heir must be expressly excluded in order to deprive him of his share in the estate. And while it is true that the testator has excluded Mrs. Blackburne in the primary division of his estate, there is nothing to show that in the secondary division, the share of his son Thomas, he also meant to exclude her. On the contrary, she comes squarely within the language of the gift, which is to 'my surviving children'; Simpson's Estate, 245 Pa. 244." The principles thus laid down and their application undoubtedly govern here; and the language itself could be fitted to the case with very little variation. Catharine Baer must be expressly excluded in order to deprive her of her share in this fund. While it is true that testator has excluded her in the primary division of his estate, there is nothing to show that in the secondary division, the share of his son Amos, he also meant to exclude her. On the contrary, she comes squarely within the language of the gift, which is to "my other heirs" share and share alike. She will, consequently, be permitted to participate in the distribution.

ULLMAN vs. HANTSCH

Contracts—Real Estate Brokers—Act 27 May, 1841, P. L. 396—Act 10 April, 1849, Sec. 18, P. L. 573—License—Validity of Claim for Compensation—Question for Jury—New Trial.

Where one pursues the business of a real estate broker, it is (under the Act 27 May, 1841, P. L. 396, as supplemented by the Act 10 April, 1849, Sec. 18, P. L. 573), a condition precedent to the lawfulness of his transactions and the validity of his claim for compensation, whether under a special contract or not, that he shall have paid for and secured a license as a real estate broker. But whether a plaintiff claiming compensation for selling real estate under a special contract is a real estate broker is not a question of law to be decided by the Court, but one of fact for the jury upon the evidence.

In the Court of Common Pleas of Berks County.

No. 125 August Term, 1918.

Assumpsit. Trial and verdict for plaintiff for \$500.

Rule for judgment n. o. v.

H. F. Kantner, for defendant and rule.

John B. Stevens, contra.

Opinion by Endlich, P. J., June 2, 1919.—Plaintiff entered into a special contract with defendant to find a purchaser for the latter's property, his compensation or commission to be \$500. He found a purchaser, and an agreement to sell, etc.,

was made between him and defendant. Owing to an error in the assumed dimensions of the lot, the transfer was not consummated, and the defendant refused to pay the plaintiff the commission above mentioned, whereupon the plaintiff brought this suit for its recovery. The defendant insists that, under the terms of the contract as it was made between himself and the plaintiff, the latter was to have nothing unless the purchaser he found actually took and paid for the property, and that therefore there is nothing owing to the plaintiff because the sale was not completed. The only question submitted to the jury was what, in this particular, the contract was. The result was a verdict for the plaintiff. Defendant thereupon obtained this rule, and seeks to support it on the ground that plaintiff, being engaged in the business of a real estate broker, was bound to take out and pay for a license as such, and that, not having done so prior to the transaction here involved, he cannot recover in this action.

The Act 27 May 1841, P. L. 396, requiring the licensing of certain brokers, was by the Act 10 Apr. 1849, sec. 18, P. L. 573, extended to real estate brokers. This extension, of course, carried with it the provision for a penalty, recoverable in a *qui tam* action, for doing business without a license, enacted in sec. 5 of the Act of 1841. Neither has any act of assembly been pointed out, since passed, which took away that penalty. The Act 7 May 1907, P. L. 175, indeed provides for certain assessments on refusal to make the required returns: see sec. 4, and for certain additions, or penalties to be added, to the license fee on failure to make payment as called for by the statute: see sec. 7; but the repealing clause in sec. 12 goes no further than to repeal all acts and portions of acts inconsistent with the Act of 1907. It is not apparent that there can be any inconsistency between its provisions and the penal clause of the Act of 1841, applicable to real estate brokers by virtue of the Act of 1849. The enactment of a liability for a refusal to make a return, and for collection of the license plus a percentage for delay, does not conflict with the existence of a criminal or quasi-criminal liability for doing business without a license. Under the doctrine based upon the existence of such an inhibition: see *Luce v. Cook*, 227 Pa. 224, 225, it would seem to follow that it is still the law that where one pursues the occupation or business of a real estate broker, it is a condition precedent to the lawfulness of his transactions and the validity of his claim for compensation, whether under a special contract or not, that he shall have paid for and secured a license as real estate broker; see *Johnson v. Hulings*, 103 Pa. 498; *Luce v. Cook*, 227 id. 224; *Meyer v. Wiest*, 250 id. 573; *Raeder v. Butler*, 19 Pa. Super. Ct. 604, which this plaintiff admittedly had not done. But the question whether such was in fact the plaintiff's business or occupation is for the jury upon the evi-

dence: *ibid.*; *Clark v. Freeport, etc., Co.*, 52 Pa. Super. Ct. 1, 5; *Meyer v. Wiest*, *supra*, at p. 576. This principle was not observed at the trial of the case. It was assumed that under the evidence it was for the Court to say whether or not the plaintiff was a real estate broker. In this there was plain error, which cannot be cured by a decision of the rule for judgment n. o. v. To make that rule absolute would be to persist in treating that as a matter of law for the Court which ought to be treated as a matter of fact for the jury, and thereby might do grave injustice to the plaintiff. To discharge the rule and allow judgment to be entered on the verdict might prove equally unfair to the defendant. In these circumstances we feel constrained to adopt the course pursued by Judge Woodward, in *Gring v. Burkholder*, 2 Woodw. 82 viz., to convert the rule for judgment n. o. v. into a rule for a new trial and proceed to decide that. That the error in not submitting to the jury the question of plaintiff's business is enough to call for a retrial, is too plain to warrant discussion.

And now, June 2, 1919, it is ordered that a rule to show cause why a new trial should not be granted be entered as of Jan. 23, 1919, nunc pro tunc; that the rule for judgment n. o. v. be discharged; and that the rule for a new trial be made absolute.

COMMONWEALTH vs. FREEDMAN

Statutes—Interpretation—Criminal Code, Sec. 55—Gambling—Lotteries.

1. When the thing done is substantially that which is prohibited by statute, it falls within the same simply because, according to the true construction, it is the thing thereby prohibited.

2. Section 55 of the Criminal Code making it a misdemeanor to set up "any game or device of . . . hazard" where money or any valuable thing is or may or shall be "played for, or staked or betted upon" covers lotteries.

In the Court of Quarter Sessions of Berks County.

No. 64 December Sessions, 1918.

Rule to quash indictment for maintaining a gambling device.

W. K. Stevens, for defendant and rule.

Wilson S. Rothermel, District Attorney, for Commonwealth.

Opinion by Endlich, P. J., June 2, 1919.—The defendant in this case was indicted under sec. 55 of the Criminal Code of 31

March 1860, P. L. 397, for maintaining, etc., a number of gambling devices known as "punch boards," the character and operation of which are set forth in a bill of particulars substantially as follows:—Each punch board on its face promised the winner in its manipulation an article named thereon; in some instances a Gillette safety razor, in some an Eastman kodak,—in each an article of value. Every board contained 70 squares or chances, upon each one of which was printed a female name. The several squares also contained a hidden number indicating the amount to be paid by the person purchasing such square, except that the numbers 1 to 10 were free and the numbers 35 to 70 were each 35 cents. At the top of the punch board was a circle in which was concealed a printed name identical with one of the names visibly printed on the squares below. When the 70 squares or chances were disposed of, the printed name concealed in the circle at the top of the punch board was disclosed, and the purchaser of the square which contained the name identical with that in the said circle got the article designated or promised on the punch board. The total sales of the 70 squares or chances in the case of every punch board yielded to the operator the sum of \$18. Purchasers of blanks, that is, of the squares that did not contain the winning name, received nothing for the money they paid.

The defendant has moved to quash the indictment on the ground that the description of the devise in the bill of particulars shows that it was not a gambling device at all, but, if anything unlawful, a lottery, and that therefore the defendant, if guilty of a violation of the law, should have been prosecuted under the provisions of the Criminal Code relating to lotteries.

It was, indeed, held in *Shreveport v. Kahn*, (La.) 67 So. 35, that a device very similar to the one here involved constituted a lottery. And in *Temple v. Com.*, 75 Va. 892, it was laid down that statutory provisions relative to the maintaining of gambling devices, etc., did not, in view of other statutory provisions distinguishing between them and lotteries, include the latter, which in this State are defined by Judge Paxson, in *Com. v. Sheriff*, 10 Phila. 203, as consisting of "the distribution of prizes by chance." The question whether this device falls under the head of gambling or lotteries is, of course, to be decided under our own statutes. Sec. 55 of the Criminal Code relating to gambling provides that—

"If any person shall set up or establish . . . any game or device of address, or hazard . . . at which money or other valuable thing may or shall be played for, or staked or betted upon. . . . The person so offending . . . shall be guilty of a misdemeanor, and . . . sentenced to . . . a fine, not exceeding \$500, and . . . imprisonment not exceeding one year," etc.

Sections 52 and 53 of the same Code concerning lotteries provide, in sec. 52—

"All lotteries . . . are hereby declared to be common nuisances, . . ."
and in sec. 53—

"If any person shall . . . erect, set up, open, make or draw any such lottery . . . he shall be guilty of a misdemeanor, and . . . sentenced to . . . a fine not exceeding \$1000, and . . . imprisonment, by separate or solitary confinement at labor, not exceeding one year," etc.

The Act 2 Apr. 1870, P. L. 46, extends sec. 73 of the Criminal Code dealing with and punishing nuisances (by fine or imprisonment or both, "according to the discretion of the Court,") to persons convicted of setting up, etc., either gambling devices or lotteries. All this legislation seems to differentiate the offence of gambling from that of maintaining a lottery, and therefore possibly to preclude a prosecution for the one based upon acts exclusively and clearly falling under the other head. It is, however, to be noted that the language of sec. 55 is exceedingly broad and comprehensive, covering "any game or device of . . . hazard," where money or any valuable thing is or may or shall be "played for, or staked or betted upon"; and if we look closely at the scheme set forth in the bill of particulars filed in this case, it appears plain enough that a purchaser of so-called chances on a punch board is in reality betting that the name in the square he has purchased will be found to be the same as the name hidden in the circle at the top of the punch board. He loses what he has paid if it is not, and he gets an article of value beyond what he has paid for his chance if the names do correspond. The result is a matter of chance or hazard. It is laid down in Maxwell, *Interpr. of Statutes*, at pp. 133-4, that when the thing done is substantially that which is prohibited by a statute, it falls within the same simply because, according to the true construction, it is the thing thereby prohibited. If the view indicated is the correct one to be taken of the transaction, it follows that an indictment of a person charged with maintaining and operating a device of this kind may properly be drawn under sec. 55 of the Criminal Code, the question whether the thing done involved gambling or lottery being for the jury, and that therefore this indictment cannot be quashed for the reason set forth by the defendant.

The rule to show cause why the indictment should not be quashed is discharged.

TRAGLE'S ESTATE

Decedents' Estates—Testamentary Guardian—Practice, O. C.

When a testator directs his trustees to perform duties with relation to his minor child that correspond to the duties of a guardian of the person and estate of such minor, the trustees will be considered as testamentary guardians, and no other guardian will be appointed.

In the Orphans' Court of Berks County.

In the matter of the four petitions of J. Frank Tragle, Jr., by Mary Ann Miller and Walter S. Tragle, praying for the appointment of Alvin B. Boyd, as his guardian.

Ellwood Deysher for petitioners.

Wellington M. Bertolet for the executors and trustees.

Opinion by Schaeffer, P. J., June 21, 1919.—Four petitions have been presented asking the Court to appoint guardians for J. Frank Tragle, Jr., a minor under fourteen years of age and the only son of J. Frank Tragle, who died on May 18, 1919, testate. Two of the applications are made by Mary Ann Miller, asking for the appointment of Alvin B. Boyd as guardian of the person of the minor and the Colonial Trust Company, as guardian of his estate. The other two applications are made by Walter S. Tragle, requesting the appointment of Edward M. Klahr as guardian of his person and The Berks County Trust Company, as guardian of the estate of the minor.

J. Frank Tragle, the decedent and father of the minor, directed in his will as follows:

"Item Fifth. I give and bequeath to Edward M. Klahr five (5) shares of the capital stock of the Tragle Cordage Company in recognition of his faithful service to me in business. I also give and bequeath to the said Edward M. Klahr the sum of five hundred dollars (\$500) in addition to his compensation as co-executor of this my last will, and request him to pay especial attention to the welfare of my son J. Frank Tragle, Jr., and to give him the same kind of attention and affection that I would have given to him if living."

"Item Eighth. I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal or mixed to the Pennsylvania Trust Company and Edward M. Klahr in trust to pay the net income thereof to my son J. Frank Tragle, Jr., for his maintenance and education as they may see fit. I

authorize and direct my said trustees to allow my said son to have his choice as to where he is to live, and who is to live with him, using their discretion, however, so that no conditions be permitted to exist or surround him that will prove detrimental. I direct my said trustees to give to my said son the sum of five thousand dollars (\$5,000), or its equivalent in Tragle Cordage Company stock, when he reaches the age of twenty-one (21) years; to give my said son five thousand dollars (\$5,000), or its equivalent in Tragle Cordage Company stock, when he reaches the age of twenty-five (25) years; and to transfer and give to my said son, his heirs and assigns, all the rest of my estate when he reaches the age of thirty (30) years."

It will be observed that in "Item Fifth," the decedent gives Edward M. Klahr, the sum of \$500 in addition to his compensation as co-executor for paying special attention to the welfare of his son and for giving him the same kind of "attention and affection" that the decedent, if living, would have bestowed on the son. The intention of the testator undoubtedly was that Klahr, in whom he had unbounded confidence, should guide and control the conduct of his son, and do all that a parent can do in seeing to it that he was properly reared. In "Item Eighth," which is the disposition of the residue of the estate, the testator gives the balance of the estate to The Pennsylvania Trust Company and Klahr in trust to pay the net income thereof to J. Frank Tragle, Jr., the minor, for his maintenance and education as they may see fit; and also directs the trustees to supervise the conditions and the place where he decides to live. The trustees are to hold and invest the entire residue and pay the income to the son as they may see fit and proper. The right of controlling the manner of living and determining the scope of the education of this minor, is plainly committed to these trustees; and it would, therefore, not only be useless but productive of harm and confusion to appoint other guardians, and thus have a conflict of authority and a situation which would be very perplexing and annoying to all concerned with the minor. The duties directed to be performed by the Trust Company and Mr. Klahr are those of a guardian, and the intention of the testator was that they should act as testamentary guardians. The fact that the testator did not by name call them testamentary guardians does not defeat his intention of having them regarded as such; and the further fact that he describes them as trustees in "Item Eighth," is immaterial; for since the duties devolving upon them are those of a guardian, they will be considered as acting in that capacity: Beilstein's Estate, 147 Pa. 85, 87.

It seems to us that there can hardly be any question that the language of the will shows the intention of the testator to have been that Mr. Klahr is to perform the duties of a guardian of the person. Moreover, whether the Trust Company and Mr. Klahr are regarded as trustees or guardians of the estate cannot matter for the purposes of this case, because they are to hold the whole residue and control and direct the expenditure of the income coming to the son, and it would, therefore, not be necessary to appoint another guardian, since so far as this estate is concerned the son will receive only what the Trust Company and Mr. Klahr see fit to give him. The will of the decedent shows that Mr. Klahr and the Trust Company are to perform the duties of a guardian, and therefore we have no authority to make any appointment in this case, and the petitions are all dismissed.

**THE REAL ESTATE TITLE INSURANCE AND TRUST
COMPANY and R. NELSON BUCKLEY, TRUSTEES
Under the Will of ROBERT N. CARSON, DEC'D,
et al. vs. THE ALLENTOWN AND READ-
ING TRACTION COMPANY, et al.**

Equity—Equity Practice—Requests.

1. It is the duty of a chancellor to find all material disputed facts, but not what the proofs were in regard thereto either one way or the other.
2. A chancellor cannot be expected to check up the work of court stenographers for the purpose of determining whether they correctly transcribed the evidence.
3. A chancellor will refuse a request to state as a finding of fact the evidence and occurrences of the trial.
4. Argumentative requests for findings of fact will be refused by a chancellor.
5. A chancellor will refuse to make a finding of fact based on evidence which is not relevant or material to any issue raised by plaintiff's bill.

Equity—Bill in Equity—Answer—Pleading—Act 28 May, 1913, P. L. 358.

6. A bill in equity praying for an accounting and the appointment of a receiver should be a simple statement of the facts upon which plaintiff's prayers are based, in order that the defendants may be duly apprised of the essential inquiry and be enabled to collect testimony to meet it.
7. In a bill in equity every fact essential to the right to the relief prayed for must be averred. Neither unproved allegations nor proof of matters not alleged can be made a basis for equitable relief.
8. Where the answer to a bill in equity is responsive the burden of establishing his case by competent proof is cast upon the plaintiff.
9. The Act 28 May, 1913, P. L. 358, abolishing the rule as to the evidence necessary to overcome a responsive answer does not apply to actions instituted prior to the passage of the act.

Equity Appointment of Receivers—Insolvency.

10. A chancellor will not appoint a receiver as a punishment for past dereliction, nor because of past dangers. Receivers are appointed because of present conditions, and well-founded apprehension of the future.

Corporations—Right of Director to Contract with Corporation.

10. A director is not debarred, by reason of his office, from entering into a contract with the corporation, but the contract is subject to the principle that where he appears on both sides of it, it will be closely scrutinized in equity, and set aside unless made in that entire good faith which the law demands of this species of fiduciary.

11. The appointment of a receiver does not necessarily follow upon the insolvency of a corporation and will not be made unless it is shown that loss will ensue to the parties in interest if the persons or officers in the present control and management of the affairs are not superseded.

In the Court of Common Pleas of Berks County in equity.

No. 1093 Equity Docket, 1913.

Bill, Answer, Replication and Testimony.

Walter B. Freed, Cyrus G. Derr and Paxson Deeter for plaintiffs.

H. P. Keiser and C. H. Ruhl for defendants.

Opinion by Wagner, J., August 11, 1919.—

FINDINGS OF FACT.

1. The Allentown and Kutztown Traction Company is a corporation organized under the laws of Pennsylvania, April 25, 1898, the name of which was January 3, 1903, changed to and is now the Allentown and Reading Traction Company. The capital stock of the said Traction Company is \$250,000, divided into shares of \$50 each.

2. Howard E. Ahrens, W. D. Mohn, Sol. K. Hoffman, F. R. Wagner, I. A. Diener, George B. Schaeffer, and F. S. Kinsey, defendants, are directors of the Allentown and Reading Traction Company.

Howard E. Ahrens was a director from December 2, 1898, to the time of the filing of the bill.

W. D. Mohn was a director from April 30, 1898, to the time of the filing of the bill.

Sol. K. Hoffman was a director from at least January 31, 1900, and continued such to the time of the filing of the bill.

F. R. Wagner was a director from June 29, 1900, to the time of the filing of the bill.

I. A. Diener was a director from November 12, 1906, to the time of the filing of the bill.

George B. Schaeffer was a director from July 8, 1903, to the time of the filing of the bill.

F. S. Kinsey was a director from January 25, 1910, to the time of the filing of the bill.

Howard E. Ahrens was Treasurer from September 10, 1901, to February 18, 1903; Assistant Manager from January 29, 1903, to February 18, 1903; and President from February 18, 1903, to the time of the filing of the bill.

W. D. Mohn was Vice-President from January 25, 1909, to the time of the filing of the bill.

I. A. Diener was Secretary from January 25, 1910, to the time of the filing of the bill.

George B. Schaeffer was Treasurer from January 25, 1904, to the time of the filing of the bill.

F. S. Kinsey was bookkeeper from September 15, 1903, to the time of the filing of the bill.

George H. Gerber was President from January 10, 1898, to February 18, 1903.

3. The Kutztown and Fleetwood Street Railway Company, defendant, is a corporation organized under the laws of the state of Pennsylvania, owning a line of street railway commencing at the village of Temple in the County of Berks, at a point of connection with the line of railway of the United Traction Company of Reading, and from such point of connection at Temple extending through the Borough of Blandon, by way of Fleetwood, to and through the Borough of Kutztown to a point of connection with the line of railway of the Allentown and Kutztown Traction Company; the total length of the railway being fourteen miles.

4. D. B. Shepp, John R. Miller, George B. Schaeffer, F. R. Wagner, Howard E. Ahrens, W. D. Mohn, R. L. Jones, John A. Rigg, Walter A. Rigg, V. S. Seltzer, L. T. Custer, and John M. Frame, defendants, are the directors of the Kutztown and Fleetwood Street Railway Company. D. B. Shepp was President of said company at the time of the filing of this bill.

5. The capital stock of the Kutztown and Fleetwood Street Railway Company consists of 4,000 shares of the par value of \$50 each.

6. John H. Passmore, the original plaintiff in this suit, at the time of the filing of the bill, February 5, 1913, owned fifty-five of these shares of stock of the Kutztown and Fleetwood Street Railway Company. He acquired 40 of these shares from Daniel B. Shepp, and 15 of these shares from Walter A. Rigg on March 15, 1912.

7. Robert N. Carson, at the time of his death, October 15, 1907, was the owner of 1,130 shares of the Kutztown and Fleetwood Street Railway Company. Eight hundred of these shares stood in the name of W. A. Rosen, and 330 in his own

name. Those that stood in the name of W. A. Rosen were acquired by Mr. Carson on July 12, 1902. These 1,130 shares were subsequent to Mr. Carson's death transferred to the Real Estate Title Insurance and Trust Company of Philadelphia and R. Nelson Buckley, trustees under the will of Robert N. Carson who, upon their application to the Court on April 6, 1914, as representing said 1,130 shares, were made parties plaintiff to this bill.

8. James W. Shepp, on June 12, 1902, acquired 200 shares of stock of the Kutztown and Fleetwood Street Railway company, which shares he owned at the time of his death, January, 1907. These shares were, on April 3, 1907, transferred to his brother, Daniel B. Shepp by Daniel B. Shepp, executor of the estate of James W. Shepp, deceased. Daniel B. Shepp, as owner of these 200 shares, upon his application to the Court, on April 13, 1914, became a party plaintiff to this suit.

9. James W. Shepp was director of the Kutztown and Fleetwood Street Railway Company from August 13, 1901, to the time of his death.

10. The stock of the Kutztown and Fleetwood Street Railway Company, including the stock of Robert N. Carson and James W. Shepp, was issued by the company under the following arrangement: George H. Gerber, Robert N. Carson, and those connected with the management and control of the railway company, estimated that the cost of the construction and equipment of the company would be \$200,000. They then arranged that a mortgage covering a bond issue of \$200,000 be executed by the company. A further arrangement and agreement was then made with a company created for the purpose of the entire scheme, known as the Allentown and Reading Construction Company, whereby and wherein the Kutztown and Fleetwood Street Railway Company agreed to pay to the Allentown and Reading Construction Company \$400,000, in \$200,000 par of each of the bonds and stocks of the company, for the construction and equipment of the railway, which they had estimated would cost \$200,000. The said stock and bonds were then to be sold by the construction company, the sale to realize \$200,000, which sum was then to be used in the construction and equipment of the railway company.

A form of agreement or contract for the sale of the stocks and bonds was then agreed upon, and they were sold by the construction company to the purchasers in accordance with this agreement. This scheme or arrangement was planned by the officers of the Kutztown and Fleetwood Street Railway Company by Mr. Carson, by Mr. James W. Shepp, and was

known to all the subscribers to the bonds. This agreement entered into is as follows: (N. of T., p. 918):

"MEMORANDUM OF AGREEMENT made this 25th day of Nov. A. D. 1901, between the Allentown and Reading Construction Company, hereinafter called Construction Company, and W. A. Rosen party of the second part, WITNESSETH:

1. That the said Construction Company agrees to sell to said party of the second forty thousand dollars, par or face value, of first mortgage, 5%, bonds of the Kutztown and Fleetwood Street Railway Company of a \$200,000 authorized issue; said bonds to be payable in thirty years, redeemable after fifteen years, interest payable semi-annually; and forty thousand dollars, par or face value, of the capital stock of the said company.

2. In consideration of which said party of the second part agrees to pay to said Construction Company the sum of forty thousand dollars, as follows: 5% upon the signing of this agreement, and the balance in such installments, and at such times, after five days' notice, as may from time to time be called for by said Construction Company, provided, that the right of said Construction Company to call for installments shall be determined and shall depend upon its right to call upon the Kutztown and Fleetwood Street Railway Company for installments under its contract with said Railway Company for building the road, and upon the payment of such installments by the Kutztown and Fleetwood Street Railway Company.

3. That said bonds shall be delivered at the time of the payment of each installment, in the amount equal in face value to said payment or if said bonds are not yet issued and ready for delivery at the time of the payment of the first installment, then a certificate duly executed by the said Kutztown and Fleetwood Street Railway Company certifying the right of said W. A. Rosen or his assigns to receive from said Construction Company bonds of said Kutztown and Fleetwood Street Railway Company to the face value of the amount paid to the said Construction Company, provided, that the said Construction Company shall, from time to time, deliver to the said party of the second part the stock of the said Kutztown and Fleetwood Street Railway Company in the same amount in face value as the bonds are required to be delivered under this agreement; provided, however, that the above referred to bonds shall be guaranteed by the Allentown and Kutztown Traction Company, and provided, further, that the said Allentown and Kutztown Traction Company shall in consideration of the lease of the said Kutztown and Fleetwood

Street Railway Company in addition to the payment of the interest on the said bonds, agree also to pay the same dividends on the stock of the said Kutztown and Fleetwood Street Railway Company, as it may from time to time earn and pay upon the stock of the said Traction Company.

IN WITNESS WHEREOF we have hereunto set our hands the day and year aforesaid.

(In ink). The word "Thousand" inserted before executing by Construction Co. This in third line 2d paragraph.

ALLENTOWN AND READING CONSTRUCTION COMPANY.

By G. H. GERBER, Attorney in fact, President.

ELLWOOD J. FOUST.

W. A. ROSEN.

The purpose of this plan was to make it appear upon the books of the Kutztown and Fleetwood Street Railway Company that the stock of said company was full paid stock. The effect and result of the plan was that the subscribers to the bonds and stocks of the company, upon payment of the par value of bonds, received as a bonus an equal amount, at par, of the stock.

11. On February 6, 1902, the Kutztown and Fleetwood Street Railway Company entered into an agreement with the Allentown and Reading Traction Company, wherein, inter alia, the said Kutztown and Fleetwood Street Railway Company agreed with the Allentown and Reading Traction Company, for the consideration therein stated, to fully build and equip a line of railway from Kutztown to Temple and to connect the same with the United Traction Company's railway at Temple, and to lease the same to the Allentown and Reading Traction Company for a term of 999 years, which agreement is as follows:

"ARTICLES OF AGREEMENT, made and concluded this sixth day of February, in the year of our Lord one thousand nine hundred and two, between the ALLENTOWN AND KUTZTOWN TRACTION COMPANY and the KUTZTOWN AND FLEETWOOD STREET RAILWAY COMPANY, hereinafter called the Railway Company.

Whereas the said Traction Company at present operates its line of railway from Allentown to the Philadelphia and Reading Railroad Company at Kutztown:

And Whereas the Kutztown and Fleetwood Street Railway Company is about to build a line of railway from Kutztown to Temple and connect with the United Traction at Temple;

NOW THIS AGREEMENT WITNESSETH, First, that for the consideration hereinafter mentioned the said railway company covenants and agrees to fully build and equip a line of railway from Kutztown to Temple and to connect the same with the United Traction Company's railway at Temple.

The said railway is to be constructed in first-class manner in every particular, and is to furnish such cars and equipment as may be required for the operation of the said road between Kutztown and Reading, and is also to build such car barn as may be required for the storing of the said cars.

The said Railway Company also agrees to build the said Traction Company's road from its present terminus east of the Philadelphia and Reading Railroad to the terminus of the said Railway Company at the Keystone House in Kutztown, Pa.

SECOND—Said Railway Company also agrees to furnish or provide such additional power machinery as may be required at Kutztown, or along the line between Kutztown and Temple to operate the said system of railway when completed as herein contemplated.

THIRD—The said Railway Company hereby covenants, promises and agrees and hereby does demise and let unto the said Traction Company its said line of railway, as herein set forth and contemplated, when completed, together with the equipments, the power machinery and all property of every description for a term of 999 years.

FOURTH—In consideration of which the said Traction Company hereby promises, covenants and agrees and guarantees to pay the principal and interest, taxes and charges on the 5 per cent. bonds of the said Railway Company to an amount of \$200,000, or so much thereof as may be required to complete said road, and also agrees and will pay during the continuance of this lease the same rate of dividend upon the capital stock of \$200,000 of the said Railway Company, as the said Traction Company may from time to time earn and declare upon its own stock.

FIFTH—The Traction Company will at all times make all repairs to the roadbed, equipments and power machinery furnished by the said Railway Company and will maintain the said roadway, equipments and machinery, and from time to time, at its own expense, replace the same, and will, at its own expense, make such additions, betterments and improvements in the line and equipments of the said Railway Company as may from time to time be required and needed for the accommodation of the public travel.

SIXTH—It is further agreed that the bonds of the said Railway Company shall be payable within thirty years, with

the right to redeem the same after the expiration of fifteen years, and that the said Traction Company, after the expiration of the said time, may require the redemption of the said 5 per cent. bonds, and either issue its own bonds in place of the said bonds or require the said Railway Company to take such legal and formal action as may be necessary to issue new bonds bearing a lower rate of interest, provided, however, that the said Traction Company shall, in the event of the refunding of its bonds herein set forth, provide and arrange for the sale of said new bonds.

SEVENTH—That the stock of the Kutztown and Fleetwood Street Railway Company shall be entitled to the dividends provided for in the Clause IV of this lease, from all earnings and profits accruing only on and after the entire completion and connection of its said lines with the United Traction Company's lines of Reading, so that the Traction Company is enabled to run its cars over the United Traction Company's lines into the City of Reading, as provided for by the terms of the contract between the Allentown and Kutztown Traction Company and the United Traction Company.

EIGHTH—It is understood that the terms of this agreement extend to the successors and assigns of the parties hereto.

Sealed with the corporate seal of the Allentown and Kutztown Traction Company and the Kutztown and Fleetwood Street Railway Company, duly attested, the day and year first above written.

THE ALLENTOWN AND
KUTZTOWN TRAC-
TION CO.

By

G. H. GERBER,
President.

Attest:

ASA R. BEERS,
Secretary.

(Corporate)
(Seal)

THE KUTZTOWN AND
FLEETWOOD STREET
RAILWAY COM-
PANY

(Corporate)
(Seal)

By

G. H. GERBER,
President.

Attest:

SOL. K. HOFFMAN,
Secretary.

Signed, sealed and delivered
in the presence of us.

BERTHA TICE,
ELLWOOD J. FOUSE.

BERKS COUNTY, ss:

On the twenty-seventh day of January, A. D. 1903, before me, the subscriber a Notary Public of the Commonwealth of Pennsylvania, residing in the City of Reading, personally appeared Sol. K. Hoffman, Secretary of the Kutztown and Fleetwood Street Railway Company, who being duly sworn according to law, says that he was present at the execution of the above indenture and saw the common or corporate seal duly affixed thereto; that the seal so affixed thereto is the common or corporate seal of the said corporation; that the said indenture of lease was duly sealed and delivered by G. H. Gerber, president of the said corporation, as and for the act and deed of the said corporation for the uses and purposes therein mentioned, and that the names of this deponent and secretary, and of G. H. Gerber as president of the said corporation subscribed to the above indenture in attestation of its due execution and delivery are of their and such of their respective handwritings.

SOL. K. HOFFMAN,
Secretary.

Sworn and subscribed before me the day and year aforesaid. Witness my hand and official seal.

(Seal)

R. B. KINSEY,
Notary Public.

12. The said Kutztown and Fleetwood Street Railway Company expended \$200,000, the proceeds derived from the sale of the \$200,000 bonds issued by said company, in manner as found in Finding of Fact 10, towards the building and equipment of said line from Kutztown to Temple. This amount was not sufficient to fully build and equip said line, and the Allentown and Reading Traction Company expended \$83,432 for the Kutztown and Fleetwood Street Railway Company to complete the same.

13. About October, 1902, the railway of the Kutztown and Fleetwood Street Railway Company was taken over by the Allentown and Reading Traction Company, and immediately after its construction on October 18, 1902, the lessee company began to operate the same and continued to operate it up to the time of the filing of the bill and since.

14. The gross earnings of the Allentown and Reading Traction Company, from the operation of both of said railways, for the year ending the first Monday of November, 1903, were \$131,419.63.

15. The real estate mentioned in Paragraph 7 of plaintiffs' bill refers to the Dorney Park property. This was purchased by the Allentown and Reading Traction Company

about August, 1899, for one dollar, subject to a mortgage of \$40,000. This property since then has continuously been the property of the Allentown and Reading Traction Company.

16. The Dorney Park property was leased on November 11, 1903, to O. S. Geiger and P. D. Lauman, or their assigns, a corporation to be formed by them and others, for a period of fifteen years, which lease, on July 12, 1905, was extended for an additional period of five years. The lease is as follows: (N. of T., pp. 109, 110, 111):

"MEMORANDUM OF AGREEMENT made and entered into this 11th day of November, 1903, by and between the Allentown and Reading Traction Company, party of the first part, hereinafter called "Company," and O. S. Geiger and P. D. Lauman, or their assigns, a corporation to be formed by them and others, parties of the second part, hereinafter called Managers, both parties covenanting for themselves, their heirs, executors, administrators, successors, and assigns.

FIRST—For and in consideration of the covenants and agreements hereinafter contained, the Company hereby lets and demises for the term of ten years from the date hereof all that certain DORNEY PARK, situated in South Whitehall Township, Lehigh County, Pennsylvania, excepting the Hotel property therein erected, and excepting the Fish Ponds therewith connected.

SECOND—The Company hereby relinquishes to said Managers all revenues derived from the Theatre and other privileges and concessions. The Company also agrees to furnish one watchman for the Park, to properly light the Park, and all permanent buildings and permanent concerns now in it or which may be placed there hereafter, and to maintain and care for said lights; to furnish the necessary current to operate any toboggan or other Park amusement features of a like character which is or may be placed in the Park by said Managers; to pay licenses for Theatre to furnish transportation to theatrical performers from Allentown to the Park and return, and to carry all baggage to and from the Park and Allentown free of charge.

THIRD—The extra lighting which may be required for any attraction or place is to be mutually agreed upon.

FOURTH—The Company is to furnish music at the Park as in the season of 1903.

FIFTH—The Managers may at their own expense erect and operate any additional lawful attraction in the Park.

The Managers are to carefully manage and operate said Park property in a lawful and businesslike manner, giving the time and attention necessary to same, and to keep up all

necessary repairs, and replace all personal property that may be destroyed, fire excepted.

The Managers are to provide and pay for all advertising. They are also to provide and pay for proper attractions at the Theatre. The Company shall have the right of supervision and censorship of the character of all performances or amusements to be offered for public entertainment, the same to be approved by the President of the Company.

That upon the failure of said Managers or their assigns to keep up the attractions so as to at least insure the present rate of travel at the Park, or should discriminate in favor of any other electric or steam railway in diverting travel from this road, this lease shall become void. The Park property is not to be sub-let by said Managers without the consent of said Company.

At the termination of this contract the Managers may remove all buildings and structures erected by them.

IN WITNESS WHEREOF the Allentown and Reading Traction Company has caused its corporate seal, duly attested, to be hereunto affixed, and the said O. S. Geiger and P. D. Lauman have hereunto set their hands and seals the day and year first above written, this agreement being executed in duplicate.

ALLENTOWN AND READ-
ING TRACTION COM-
PANY

By H. E. AHRENS,
President.

Attest: ASA R. BEERS,
Secretary.

O. S. GEIGER,
PHILIP D. LAUMAN.

Witness:

H. L. LARK.
(Seal of Allentown and Read-
ing Traction Co.)

MEMORANDUM OF AGREEMENT to be attached to agreement made between the Allentown and Reading Traction Company and the Dorney Park Amusement Company, dated the 11th day of November, 1903:

IT IS HEREBY MUTUALLY UNDERSTOOD AND AGREED that the terms and conditions named in this agreement shall be and hereby are binding upon both parties to this agreement for an additional period of five years, making the life of this agreement to be fifteen years instead of ten years, from date of the original agreement.

IN WITNESS WHEREOF The Allentown and Reading Traction Company and the Dorney Park Amusement Company have caused their corporate seals, duly attested, to be hereto affixed, this 12th day of July, 1905, this agreement being executed in duplicate.

(Seal of Allentown and ALLENTOWN AND READING TRACTION COMPANY.)

By H. E. AHRENS,
President.

Attest: ASA R. BEERS,
Secretary.

(Seal of Dorney Park DORNEY PARK AMUSEMENT COMPANY.)

By F. S. KINSEY,
President.

Attest:
WM. A. MANNEBACK,
Secretary."

17. The indebtedness of cost of road during the year ending the first Monday of November, 1903, was increased from \$545,257.66 to \$635,226.14, an increase of \$89,968.48.

18. The gross earnings of the Allentown and Reading Traction Company from said railways for the year ending the first Monday of November, 1904, were \$135,533.53, and the indebtedness of the company was increased from \$684,616.80 to \$909,855.96.

19. The report to the Bureau of Railways for the year ending June 30, 1904, was prepared by H. L. Lark, one of the attorneys of the Allentown and Reading Traction Company, and F. S. Kinsey, a clerk of the company. In the report they placed an item of \$100,000, under Schedule D, Construction and Equipment, A, Organization, as total cost of said organization to June 30, 1904. This is carried along in the subsequent reports to the Department of Bureau of Railways. This item of \$100,000 was estimated by H. L. Lark and F. S. Kinsey on account of the insufficiency of data that they had at hand at the time said report was made. This amount includes three items, all of them paid prior to the first Monday of November, 1902. The items are: \$25,000 paid by the Allentown and Kutztown Traction Company to the Allentown and Reading Electric Street Railway Company when the lease was made by the Electric Company to the Traction Company, and \$5,000 each to S. D. Lehr and George H. Gerber.

20. The gross earnings of the Allentown and Reading Traction Company from the operation of said railroads, for the year ending the first Monday in November, 1905, were \$155,-372.45, and the indebtedness of the company during this period was increased from \$909,855.96 to \$914,170.71.

21. The gross earnings of the Allentown and Reading Traction Company from the operation of said railroads, for the year ending the first Monday in November, 1906, were \$168,448.77; and the indebtedness of the company during this period was decreased from \$914,170.71 to \$913,521.33.

22. The gross earnings of the Allentown and Reading Traction Company from the operation of said railroads were, in the year ending the first Monday of November, 1907, \$165,-194.52; and the indebtedness of the company was decreased from \$913,521.33 to \$803,776.66.

23. The gross earnings of the Allentown and Reading Traction Company from the operation of said railroads, for the year ending the first Monday of November, 1908, were \$157,994.02; and the indebtedness of the company, for this period, was increased from \$803,776.66 to \$1,110,622.07.

24. The gross earnings of the Allentown and Reading Traction Company from the operation of said railroads, for the year ending the first Monday of November, 1909, were \$165,434.37; and the indebtedness of the company, for this period, was increased from \$1,110,622.07 to \$1,135,345.71.

25. On November 1, 1902, the said Traction Company placed on its own and its lease-hold interest in the Kutztown and Fleetwood Street Railway, a mortgage to secure a bond issue of \$750,000; and, on May 1, 1907, the said Traction Company placed upon its railway and lease-hold interest, aforesaid, an additional mortgage to secure a bond issue of \$300,000.

ANSWERS TO PLAINTIFFS' REQUESTS FOR FINDINGS OF FACT.

Plaintiffs have filed 82 requests for Findings of Fact. These must be considered and disposed of in the light of the issues raised by the pleadings. Many of these requests are recitals of evidence, are for that reason not proper, and, consequently are refused. "The request merely states or summarizes a portion of the testimony upon a point at issue. Under our practice a chancellor may not be called upon to find that certain testimony was presented upon a given issue; it is his duty to find all material disputed facts, but not what the proofs were in regard thereto either one way or the other." *Evans vs. Quinlan, et al.*, 240 Pa. 298, 302.

A number of these requests, for example, eighteen, nineteen, twenty, twenty-one, and twenty-three, are requests for the Court to state occurrences that happened during the trial, such as that certain minutes and statements were offered in evidence, joined with the further request that the Court find as a fact that exhibits have been correctly transcribed. Of the 1272 typewritten pages of notes of testimony in this case, about two-thirds consist of exhibits. It is presumed that the two court stenographers correctly transcribed the evidence, including these exhibits, and the Court cannot be expected to check up their work, for the purpose of determining whether they correctly transcribed the evidence. The Court has been asked in a number of requests to find as a fact that the defendants, in undertaking to give an account of the receipts of the moneys of the company, furnished statements as exhibits. These again merely recite an occurrence of the trial. These statements were copies of book accounts and were admitted in evidence, for the purpose of expediting the hearings, upon the same basis as if the items contained therein had been testified to from the books of the defendant company (see pages 391, 699, 770).

FIRST REQUEST FOR FINDING OF FACT.

This request we affirmed in our first finding of fact.

SECOND REQUEST FOR FINDING OF FACT.

The part of this request that we considered material we affirmed in our second finding of fact. The part not affirmed is refused as not material.

THIRD REQUEST FOR FINDING OF FACT.

This request we divided into two findings of fact and affirmed it, as shown in our third and fourth findings of fact.

FOURTH REQUEST FOR FINDING OF FACT.

This we affirmed in our fifth and sixth findings of fact.

FIFTH REQUEST FOR FINDING OF FACT.

This we affirmed, with additional matter, as shown in the seventh and eighth findings of fact.

SIXTH REQUEST FOR FINDING OF FACT.

This request was modified and enlarged in our tenth finding of fact.

SEVENTH REQUEST FOR FINDING OF FACT.

This we affirmed in our eleventh finding of fact.

EIGHTH REQUEST FOR FINDING OF FACT.

This we affirmed in our thirteenth finding of fact.

NINTH, TENTH, ELEVENTH, TWELFTH, THIRTEENTH, AND FOURTEENTH REQUESTS FOR FINDINGS OF FACT.

These we refuse as not being proper requests. The reports referred to were offered in evidence. The requests are mere recitals of evidence.

FIFTEENTH REQUEST FOR FINDING OF FACT.

The first part of this, with reference to the \$250,000 mortgage, is refused as not material to any questions raised by the pleadings. The part with reference to the \$750,000 mortgage and the \$300,000 mortgage was affirmed as shown in the twenty-fifth finding of fact.

SIXTEENTH REQUEST FOR FINDING OF FACT.

This is refused. It is not material. There is no averment in the bill of any irregularities, mismanagement, misconduct, or misappropriations by the officers of the Keystone Light, Heat & Power Company with respect to either the moneys arising from the operation of the plant or from the sale of stocks or bonds of the company (see defendants' objections, pp. 90, 96, N. of T.)

SEVENTEENTH REQUEST FOR FINDING OF FACT.

Affirmed in so far as found in the fifteenth and sixteenth findings of fact; otherwise refused as not material.

EIGHTEENTH REQUEST FOR FINDING OF FACT.

Refused as not being a proper request in that it asks the Court to find as a finding of fact that the minutes of the Allentown and Reading Traction Company, from April 30, 1898, to April 11, 1916, offered in evidence, and covering 200 typewritten pages, have been correctly transcribed by the stenographer. That is, it is a request to the Court to check up the work of the court stenographers, and, after having done so, to certify in a finding of fact the correctness of that work.

NINETEENTH REQUEST FOR FINDING OF FACT.

Refused as not material. It is a request to find what plaintiffs' allege they did prior to the filing of the bill, to secure evidence, and also what it is alleged occurred at the trial of the case.

TWENTIETH, TWENTY-FIRST, TWENTY-SECOND, TWENTY-THIRD, TWENTY-FOURTH REQUESTS FOR FINDINGS OF FACT.

These are refused upon the ground that they are not proper. They are requests that the Court find that certain exhibits offered, first, have been offered as evidence, second, that they have been correctly transcribed. The exhibits con-

sist of statements taken from the books of the defendant company, and are found on these pages in the notes of testimony: 700-750; 742-750; 991-1026; 1044-1047; 1083-1139, each inclusive.

TWENTY-FIFTH REQUEST FOR FINDING OF FACT.

This is refused for the following reasons:

1. It is a recital of evidence.
2. It is argumentative.
3. The greater part thereof is immaterial.

TWENTY-SIXTH REQUEST FOR FINDING OF FACT.

This is refused. It is not a proper request.

1. It consists of a request asking as a finding of fact that plaintiff had called as on cross-examination a witness, F. S. Kinsey, and then proceeded to examine him as to the assets and liabilities of the company as of November 1, 1902.
2. It is a request to the Court to state what this witness testified to and admitted in the course of the cross-examination.
3. It is a request to state the evidence and occurrences of the trial.

TWENTY-SEVENTH REQUEST FOR FINDING OF FACT.

This is refused on the following grounds:

1. It is a recital of evidence.
2. The items in the request, from the year 1898 to the year 1903, pages 19, 20, and 21 of plaintiffs' requests for findings of fact, are immaterial for the reason that they cover a time not embraced in the bill (see defendants' objections, pp. 1, 343, 798, 884, notes of testimony).

TWENTY-EIGHTH TO FORTY-FOURTH (INCLUSIVE) REQUESTS FOR FINDINGS OF FACT.

These are refused for the following reasons:

1. They contain requests for findings that certain evidence was offered at the hearing.
2. They contain requests for findings of happenings at the time of the trial; example: A request that defendant did not explain certain items when called upon to do so at the hearing.
3. The requests are argumentative, in that they ask, as a finding of fact, that the Court find that certain matters contained in these requests are "presumably" or are "to be presumed" to be as therein stated.

4. The items referred to in said requests are of a date prior to the time averred in the bill, to wit, November 1, 1902, and there is not sufficient evidence in this case to show that these items were paid subsequent to November 1, 1902, and, therefore, are not material or relevant.

5. There are no allegations in the bill of misconduct on the part of the defendants in that they created fictitious and illegal assets upon the books of the company.

6. The evidence is not sufficient to warrant the finding as a fact, the conclusion that we are asked to find, that is, that the company created fictitious and illegal assets upon the books of the company.

FORTY-FIFTH REQUEST FOR FINDING OF FACT.

This is refused on the ground that:

1. It is a recital of evidence.
2. A number of the matters recited in this request are occurrences prior to the time covered by the bill.
3. The evidence is not sufficient for the Court to find that the salaries and compensation referred to in this request were excessive, or not earned.

FORTY-SIXTH REQUEST FOR FINDING OF FACT.

This is refused for the reason that it is not material or relevant to any issue raised by the bill.

FORTY-SEVENTH REQUEST FOR FINDING OF FACT.

This is refused on the following grounds:

1. It is a recital of evidence.
2. There are no allegations in the bill of misconduct on the part of the defendants in that they created fictitious and illegal assets upon the books of the company.
3. The evidence is not sufficient to warrant the finding as a fact, the conclusion that we are asked to find, that is, that the company created fictitious and illegal assets upon the books of the company.

FORTY-EIGHTH REQUEST FOR FINDING OF FACT.

This is refused on the following grounds:

1. It is a recital of evidence.
2. It is matter not material to any issue raised by the bill.

FORTY-NINTH REQUEST FOR FINDING OF FACT.

This is refused on the following grounds:

1. It is a recital of evidence.

2. It is not relevant to any issue raised by the bill.
3. It is argumentative.
4. There are no allegations in the bill of misconduct on the part of the defendants in that they created fictitious and illegal assets upon the books of the company.
5. The evidence is not sufficient to warrant the finding as a fact, the conclusion that we are asked to find, that is, that the company created fictitious and illegal assets upon the books of the company.

FIFTIETH REQUEST FOR FINDING OF FACT.

This is refused for the following reasons:

1. It is not relevant or material to any issue raised by the plaintiff's bill.

(a) There is no allegation in the bill of misconduct or misappropriation of the receipts of the Keystone Electric Light, Heat & Power Company, by the officers and directors of the Allentown and Reading Traction Company, in so far as they may have had anything to do in the management of the affairs of the Keystone Electric Light, Heat & Power Company.

2. The agreements of November 1, 1900 and May 1, 1907 (N. of T., 102, 106) did not take the management of the Keystone Electric Light, Heat & Power Company from the directors and officers of said company and place the management in the directors and officers of the Allentown and Reading Traction Company.

3. The request contained therein, including that for a finding of a fictitious liability, is not supported by the evidence in this case.

FIFTY-FIRST REQUEST FOR FINDING OF FACT.

This is refused upon the grounds as stated in Nos. 1 and 2 of the answer to the fiftieth request for finding of fact.

FIFTY-SECOND REQUEST FOR FINDING OF FACT.

This is refused upon the grounds as stated in Nos. 1 and 2 of the answer to the fiftieth request for finding of fact, and,

3. The evidence is not sufficient to support the finding that the net receipts and income from the Keystone Electric Light, Heat & Power Company, after the payment of expenses of said company, were not turned over to the Allentown and Reading Traction Company, in accordance with the agreements of November 1, 1900, and May 1, 1907.

FIFTY-THIRD REQUEST FOR FINDING OF FACT.

This is refused on the following grounds:

1. It is a recital of evidence.
2. It is argumentative.
3. There is not sufficient evidence to find that the items complained of are abnormal.

FIFTY-FOURTH REQUEST FOR FINDING OF FACT.

This is refused on the following grounds:

1. It is a statement of evidence.
2. There is not sufficient evidence to show said amount was not properly expended by the Allentown and Reading Traction Company for the Kutztown and Fleetwood Company.
3. It is the undisputed evidence that the officers and directors of both companies, at the time of the creation of this indebtedness by the Allentown and Reading Traction Company for the Kutztown and Fleetwood Company, were fully cognizant of this matter, and that it was done with their approval and knowledge.
4. The plaintiffs are not in a position to complain of the acts of the Allentown and Reading Traction Company in completing the Kutztown and Fleetwood Company, so that same could be operated.

FIFTY-FIFTH AND FIFTY-SIXTH REQUESTS FOR FINDINGS OF FACT.

These are refused for the same reasons as stated in the answer to the fifty-fourth request for finding of fact, and,

5. The evidence is not sufficient to warrant a finding of duplication of assets, or of the creation of fictitious or illegal assets.

FIFTY-SEVENTH REQUEST FOR FINDING OF FACT.

This is refused because:

1. The Romig Mill property was purchased in June, 1899, prior to the time averred in the bill.
2. It is a recital of evidence.
3. There is no averment in the bill of the inflating of assets of the traction company or of creating fictitious and illegal assets.
4. The preponderance of the evidence shows the property was purchased for \$18,000, and not \$14,000.

FIFTY-EIGHTH REQUEST FOR FINDING OF FACT.

This is refused because:

1. It is a recital of evidence.
2. The property referred to is the T. J. Helfrich real estate, and is still owned by the defendant company.
3. The request is not borne out by the evidence.

FIFTY-NINTH REQUEST FOR FINDING OF FACT.

This is refused for the following reasons:

1. There is no evidence to support the finding that the Allentown and Reading Traction Company received \$15,000 damages as alleged in this request. The minutes of May 13, 1903, (N. of T., p. 542) are an authorization to the officers to settle for \$15,000; they are not evidence that the officers received \$15,000. The minutes of September 1, 1905 (p. 567), March 7, 1906 (p. 571), April 11, 1906 (p. 571), and November 12, 1906 (pp. 575, 576), clearly show the settlement authorized was not affected.
2. This matter is not covered by the pleadings.

SIXTIETH REQUEST FOR FINDING OF FACT.

This is refused for the following reasons:

1. It is not relevant. Said matter is not covered by the pleadings.
2. No fictitious or illegal asset was created. In Trial Balances (N. of T., 1003) on Dr. side they have Dorney Park property at \$30,125.34 and on the Cr. side A. Reed Hayes, \$30,000, which represents the Dorney mortgage; and, under the debit side (p. 1025) \$30,125.34 and on the credit side, Dorney Park mortgage, \$29,000.

SIXTY-FIRST REQUEST FOR FINDING OF FACT.

This is refused for the following reasons:

1. The evidence does not show that the amounts paid by the Allentown and Reading Traction Company, in the Dorney Park project, were paid for any other purpose than to increase the travel to the Park, on its railway, and thus increase its receipts.
2. The salaries received by the officers of the Dorney Park Amusement Company and the dividends declared, are not shown to be excessive.
3. It is a recital of evidence.
4. It is not covered by the pleadings.

SIXTY-SECOND REQUEST FOR FINDING OF FACT.

This is refused on the grounds:

1. It is a recital of evidence.
2. There is no evidence to show any wrong-doing in the issuance or sale of bonds. The evidence clearly shown that at the time these bonds were sold the credit of the company was poor, and that therefore the market value of the bonds was below the par value. The market value of the bonds was received in the sale thereof (p. 414, 415).

3. This matter is not covered by the pleadings.

4. The method of procedure by the company in carrying this item was merely a bookkeeping method to account for the difference of the amount received in cash for the bonds and the par value thereof.

SIXTY-THIRD REQUEST FOR FINDING OF FACT.

This is refused on the grounds:

1. It is a recital of evidence.
2. It is argumentative.
3. The trial balances offered are not inventories of assets of the company.

SIXTY-FOURTH REQUEST FOR FINDING OF FACT.

This is refused on the grounds:

1. It is a recital of evidence.
2. It is argumentative.
3. It is a conclusion not supported by the evidence.

SIXTY-FIFTH REQUEST FOR FINDING OF FACT.

This is refused on the grounds:

1. It is a recital of evidence, that is, what the minutes of March 26, 1902 (N. of T., 507) contain.
2. There is no evidence that the resolution contained in the minutes, with reference to the bond issue, was ever carried out.

SIXTY-SIXTH REQUEST FOR FINDING OF FACT.

This is refused on the grounds:

1. It is a recital of evidence.
2. It is generally immaterial to the issues raised.

SIXTY-SEVENTH REQUEST FOR FINDING OF FACT.

This is refused on the grounds:

1. It is a recital of evidence.
2. There is no allegation in the bill that borrowing of money was illegally done by the company.
3. The evidence shows the moneys borrowed were used for purposes of the company.

SIXTY-EIGHTH REQUEST FOR FINDING OF FACT.

This is refused on the grounds:

1. It is a recital of evidence.
2. It is immaterial to the issues raised by the pleadings.
3. It is not supported by the evidence.

SIXTY-NINTH REQUEST FOR FINDING OF FACT.

This is refused on the grounds:

1. It is a recital of evidence.
2. It is not shown by the plaintiffs that the difference of amounts was not properly and legally expended.

SEVENTIETH REQUEST FOR FINDING OF FACT.

This is refused on the grounds:

1. It is a recital of evidence.
2. It is argumentative.
3. The request that the figures contained in this request "compel the inference" is not a proper request for a finding of fact.
4. The evidence does not show a misappropriation of the \$108,387.16.

SEVENTY-FIRST REQUEST FOR FINDING OF FACT.

This is refused on the ground that:

1. It is a recital of evidence.
2. It is not material to the issues raised by the pleadings.

SEVENTY-SECOND REQUEST FOR FINDING OF FACT.

This is refused on the ground:

1. It is a recital of evidence of what the minutes and reports to the Bureau of Railways show.

SEVENTY-THIRD REQUEST FOR FINDING OF FACT.

This request is refused because:

1. It is a recital of evidence.
2. It is argumentative.
3. The agreements of November 1, 1900, and of May 1, 1907, do not take away from the Fleetwood and Kutztown Electric Light Company its charter right to manage its own affairs and pay compensation for services of its officers.
4. It is not relative or material to the issues raised by the pleadings.

SEVENTY-FOURTH REQUEST FOR FINDING OF FACT.

This is refused on the following grounds:

1. It is a recital of evidence.
2. It is argumentative.
3. The conclusion of "third payments of salary for the same time" is not supported by the evidence.

SEVENTY-FIFTH REQUEST FOR FINDING OF FACT.

This is refused on the grounds:

1. It is a recital of evidence.
2. It is argumentative.
3. The matter of second and third payments of the same salary to H. E. Ahrens is not borne out by the evidence.
4. There is no evidence to show that the \$125,000 of Second Consolidated bonds received by H. E. Ahrens and Brother for their indebtedness of \$99,950 were worth more in the market than the defendant company received in settlement of the claim of H. E. Ahrens & Brother.

SEVENTY-SIXTH REQUEST FOR FINDING OF FACT.

This is refused on the grounds:

1. It is a recital of evidence of the books of the company and of F. S. Kinsey.
2. It is argumentative.
3. There is no evidence to show H. E. Ahrens improperly or illegally received \$11,950.

SEVENTY-SEVENTH REQUEST FOR FINDING OF FACT.

This is refused because it is not supported by the evidence. The actual intent and effect of the contract between Kutztown and Fleetwood Street Railway Company and the Allentown and Reading Construction Company is stated in our tenth finding of fact. Also see N. of T., pp. 899 to 908, inclusive, and exhibits, pp. 917 to 937, inclusive.

SEVENTY-EIGHTH REQUEST FOR FINDING OF FACT.

This is refused on the grounds:

1. It is a recital of evidence.
2. There is no evidence to support the conclusion as a fact that the said items, alleged to be unexplained, apparently constitute a fictitious and illegal liability.

SEVENTY-NINTH REQUEST FOR FINDING OF FACT.

This is refused because it is a recital of evidence.

EIGHTIETH REQUEST FOR FINDING OF FACT.

This is refused on the grounds:

1. It is a recital of evidence.
2. It is argumentative.
3. It is not material or relevant to the issues raised by the pleadings.

EIGHTY-FIRST REQUEST FOR FINDING OF FACT.

This is refused because it is a recital of evidence.

EIGHTY-SECOND REQUEST FOR FINDING OF FACT.

This is refused because it is immaterial and not relevant to the issues raised by the pleadings.

DISCUSSION.

On February 5, 1913, John H. Passmore, the original plaintiff in this action, filed a bill in equity, and upon the facts stated therein, prays the Court:

First—That the defendants be required to render a full and perfect account, under the direction of the Court, of all moneys and other assets and properties of every description received, held or owned, by the Allentown and Reading Traction Company since its incorporation, and all income therefrom; also of all payments and disposition of its money and other assets and property of every description since said date.

Second—That a receiver be appointed of the Allentown and Reading Traction Company.

John H. Passmore filed this bill as a holder of 55 shares of stock of the Kutztown and Fleetwood Street Railway Company. These he acquired on March 12, 1912. On May 31, 1912, he entered a suit in the District Court at Philadelphia, praying for the appointment of a receiver. This suit was discontinued, whereupon he filed the bill in equity now under consideration. After the institution of this suit, the individual interest of this original plaintiff in the results thereof apparently ceased. Although the appointment of a receiver for this road, through the populous district of the Lehigh Valley between Reading and Allentown, a distance of 36 miles, necessarily would be of the greatest consequence to the creditors and holders of bonds of this company, yet Mr. Passmore at no time, either before filing this bill or since, has seen his counsel personally with reference thereto (N. of T., pp. 648, 650). The facts stated in the bill were not furnished by Mr. Passmore,

but were obtained partly from Mr. Daniel B. Shepp and partly from the reports filed at Harrisburg (N. of T., p. 648). Notwithstanding the fact that the hearings in the case covered a period extending from May 29, 1916, to June 19, 1916, inclusive, he at no time appeared at any of them to substantiate the allegations contained in his bill, and all that counsel knew of his whereabouts was that when counsel had last heard of him "he had gone to Michigan, somewhere" (N. of T., p. 648).

On April 6, 1914, and on April 13, 1914, upon their respective petitions, the Real Estate Title Insurance and Trust Company of Philadelphia and R. Nelson Buckley, Trustees under the will of Robert N. Carson, as representing 1,130 shares of the capital stock of the Kutztown and Fleetwood Street Railway Company, issued to Robert N. Carson during his life time, and Daniel B. Shepp, as the owner of 200 shares of stock, said stock having been acquired by Robert N. Carson and James W. Shepp in manner as found in our tenth finding of fact, were made parties plaintiff with John H. Passmore.

The principal cause of complaint, as shown in paragraphs 16 (latter part) and 20, as affecting these plaintiffs individually, is their failure to receive dividends upon the stock of the Kutztown and Fleetwood Street Railway Company, for which not a cent had been paid, as is clear from the testimony of Mr. George H. Gerber (N. of T., pp. 899 to 907, inclusive, and exhibits, pp. 917 to 937, inclusive).

The case came up for hearing on May 29, 1916, and the taking of evidence was completed on June 19, 1916. The notes of testimony were filed on November 3, 1916. The argument was made at the monthly argument court in December, 1917. A great deal of testimony was admitted under defendant's objection, the principal objection being, as is shown on page 1 of notes of testimony, that the evidence was irrelevant and immaterial in that it did not bear upon any issue raised by the pleadings. The various objections are found on pages 1, 2, 61, 62, 63, 74, 76, 96, 112, 312, 343, 345, 416, 793, 794, 884, and 1266.

The first matter then for us to consider is the issues raised by the pleadings. These are:

1. That while the gross earnings of the Allentown and Reading Traction Company, from the operation of both the Allentown and Reading and the Kutztown and Fleetwood for the year ending the first Monday of November of the year mentioned in the paragraphs, are the amounts as respectively stated therein, yet these total earnings were entirely absorbed, whereas 60 per cent. of the gross earnings in operation would have been an ample allowance for the cost of operation and thus would have left amounts appropriable to dividends paragraphs 6, 8, 9, 10, 11, 12, 13, and 14).

2. That the interest bearing indebtedness of the Allentown and Reading Traction Company, during the year specified in the respective paragraphs, had been increased to the amounts stated therein, without any addition to the railroad or equipment that would account for the same (paragraphs 8, 9, 10, 11, 13, and 14).

3. That real estate and buildings owned by the Allentown and Reading Traction Company, valued at \$126,787.01, had disappeared from the company's assets (paragraphs 7 and 14).

4. That during the year ending the first Monday of November, 1903, the company's cost of road was arbitrarily increased by nearly \$100,000, without any addition to the railroad or equipment, to account for the same (paragraph 7).

5. That a consolidated mortgage, given to secure \$750,000 of bonds, dated November 1, 1902, and another mortgage to secure \$300,000 of bonds, dated May 1, 1907, had been executed and issued by the Allentown and Reading Traction Company, without the consent of the Kutztown and Fleetwood Street Railway Company and in fraud of the rights of the stockholders of said company (paragraph 15).

6. The general averment that the Allentown and Reading Traction Company is insolvent for the reason as therein stated (paragraph 17).

7. The general averment that the Allentown and Reading Traction Company has grossly neglected to maintain the physical condition of the Kutztown and Fleetwood Street Railway Company (paragraph 18).

8. The general averment that the books and accounts kept by the Allentown and Reading Traction Company, for its own purposes, and the reports required to be filed by the State of Pennsylvania and sworn to by the officers of said company, and filed at Harrisburg, are at such great variance that the charter of the company has been placed in jeopardy and is liable to be forfeited by reason thereof (paragraph 19).

To all of these allegations the defendants filed a responsive answer. Because of the issues thus raised, and the wide range of the evidence admitted in this case, it is necessary to state the law as bearing upon the admissibility of evidence, in the light of the issues raised by the pleadings.

The allegations in the bill, upon which the plaintiffs' base the prayers contained therein should be a simple statement of the essential facts of the case: Equity Rules, 17; Thompson's Appeal, 126 Pa. 367, 371; Winebrenner et al. vs. Colder et al., 43 Pa. 244; Henry vs. Black, 210 Pa. 245. This is necessary, as is stated in Thompson's Appeal, supra (p. 371): "That

the parties may be duly apprised of the essential inquiry, and be enabled to collect testimony to meet it."

The 16th paragraph of plaintiffs' bill contains a blanket averment that the Allentown and Reading Traction Company, its officers and directors, have grossly mismanaged the business of operating the railroad; have wasted its property with intent to prevent the plaintiffs and others from receiving dividends; have wasted and misapplied moneys from the operation of the road and promulgation of bonds and notes; have issued securities and paid interest on the same without legal consideration therefor, and have generally acted in bad faith and in disregard and fraud of plaintiffs' rights. Upon this general averment plaintiffs base their right to the admission of testimony, *inter alia*, bearing on the cost of construction, the items of which begin on December 13, 1898, as shown in Exhibit "EE1," N. of T., page 1083 (see defendants' objection to said testimony on pages 343 and 344, N. of T.) The specific averments in the bill (paragraph 7) begin with the year ending the first Monday of November, 1903, and relate to the cost of operation. These matters of construction, under this general averment, if they can be considered at all, can be considered only as plaintiffs show items in the account paid subsequent to November 1, 1902. In *Biery vs. Graphite Co. et al.*, 1 *Lehigh County Law Journal*, 400, we have this statement of the rule (p. 401): "In order to avail for either purpose, fraud as a fact and not as presumption or inference must be clearly, directly and explicitly averred, not by indirection or argumentatively: *Finletter vs. Appleton*, 185 Pa., 349, 353; *Graeff vs. Felix*, 200 id, 137, 139. Hence the allegations of mismanagement of the corporate business by defendants, resulting in disaster, are really of no moment." In *Jones et al., vs. Wyomissing Club*, 261 Pa. 190, (affirmed *per curiam*), at page 192, we have: "In a bill in equity, every fact essential to the right to the relief prayed for must be averred: *Thompson's app.*, 126 Pa. 367; *P. S. V. R. R. Co. vs. P. & R. R. R. Co.*, 160 Pa. 277; *Finletter vs. Appleton*, 195 Pa. 349; *Luther vs. Luther*, 216 Pa. 1; *Rittenhouse vs. Newhard*, 232 Pa. 433; *Spangler Brewing Co. vs. McHenry*, 242 Pa. 522; and a demurrer admits only what is adequately stated in the bill, not conclusions of law or argumentative or doubtful inferences from facts detailed: *Com. vs. Allegheny Com'rs*, 37 Pa. 277, 279; *Getty vs. Pa. Inst. for Blind*, 194 Pa. 571, 575; *Bussier vs. Weekly*, 4 Pa. Superior Ct. 69, 72." The principal upon which the evidence must be considered is thus stated in *Spangler Brewing Co. vs. McHenry*, 242 Pa. 522, by Mr. Justice Brown, at page 528: "Proceedings in equity may be elastic, but there is a limit to their elasticity. They are not to be stretched to give relief from a specific wrong not averred

in a bill of complaint or to make a decree not in conformity to its prayers. This is just what was done in the case before us, and it was done in plain disregard of a rule of equity procedure laid down in all the text books and repeated time and again in chancery reports. Learned counsel for appellee make no attempt in their printed brief to justify this irregular proceeding. 'The relief afforded by a decree in equity must conform to the case as made out by the pleadings as well as to the proofs. Every fact essential to entitle a plaintiff to the relief which he seeks must be averred in his bill. Neither unproved allegations nor proof of matters not alleged can be made a basis for equitable relief. Relief cannot be granted for matters not alleged: 16 Cyclopaedia of Law and Procedure, 483. Neither allegations without proof nor proof without allegations, nor allegations and proof which do not substantially correspond, will entitle complainant to relief, unless the defect be remedied by amendment: 1 Daniel's Ch. (6th Ed.), 361, note. A complainant can be afforded such relief only as he is entitled to under the allegations of the bill: Marshman vs. Conklin, 21 N. J. Eq. 546. The order or decree of a court of chancery should conform to the prayer in the bill: Horton's App., 13 Pa. 67. A master who finds that there is nothing in the testimony to sustain a bill as it is filed, should report a decree dismissing it: Morio's App. 4 Pennypacker 398. Every averment necessary to entitle a plaintiff in equity to the relief sought must be contained in the stating part of the bill: Thompson's App., 126 Pa. 367; P. S. V. Railroad Co. vs. P. & R. Railroad Co., 160 Pa. 277. Authorities need not be multiplied in support of the rule that the relief afforded by the decree must conform to the case as made out by the pleadings, and that it must be consistent with the relief prayed for. Applying this rule to the decree before us, it cannot be affirmed;' Luther vs. Luther, 216 Pa. 1." In Thompson's Appeal, supra, it is stated (p. 371): "If the proofs go to matters not within the allegations of the parties, the Court cannot act upon them: Piatt vs. Vattier, 9 Pet. 404; Harrison vs. Nixon, 9 Pet. 483." See also Frey vs. Stipp, 224 Pa. 390; Luther vs. Luther, 216 Pa. 1; Bishop vs. Buckley, 33 Pa. Superior Ct., 123, 128.

Defendants' responsive answer cast upon plaintiffs the burden to establish their case by competent proof. In Shingle vs. Smyth, Henry & Kirkbride, 248 Pa. 359, at page 363, we have: "The answer filed by defendant is responsive to the bill, and, if true, contains a complete defense to the action. The replication put in issue the facts so set forth, but did not relieve plaintiffs from the ordinary burden cast upon them to make out their case by competent proof. 'Except as to the effect of a responsive answer in equity, the burden of proof

and the rules of evidence are the same at law and in equity,' *Bussier vs. Weekey*, 11 Pa. Super. Ct. 463, 478. . . . As said by Judge Smith in *Bussier vs. Weekey*, supra, page 474; 'By requiring him to answer, the plaintiff makes him a witness and his answer becomes evidence in the cause. If unfavorable to the plaintiff it must nevertheless stand as conclusive unless overcome by a preponderance of testimony. This preponderance is to be found in the testimony of two witnesses on the part of the plaintiff, or of one witness with corroborating circumstances equivalent, in probative effect, to the testimony of another witness. The reports abound in illustrative cases.' In *Riegel vs. American Life Ins. Co.*, 153 Pa. 134, page 143, this Court said: 'The special evidential efficacy of a responsive answer in equity is due to the fact that the plaintiff, by calling on the defendant to answer the allegations of the bill, appeals to his conscience, accredits him, and, pro hac, makes him his own witness.'" This suit was instituted on February 5, 1913. Therefore the act of May 28, 1913, P. L. 358, abolishing this rule of evidence, necessary to overcome a responsive answer, does not apply. On page 364 (*Shingle vs. Smyth et al*, supra) Mr. Justice Frazer further says: "As the bill in this case was filed prior to that act, it has no application." See also Act May 28, 1913, P. L. 358.

The amounts of the gross earnings of the defendant company, as averred in the plaintiff's bill, from the operation of the railroads, we have found as findings of fact. These findings are supported by the statements of the officers of the defendant company in their reports to the Auditor-General at Harrisburg, which reports were offered in evidence. The amounts of the gross earnings are contained in the exhibits on pages 9, 15, 21, 28, and 32, notes of testimony. These amounts vary but little from the amounts of gross earnings admitted in defendants' answer and from the amounts as testified to from the books, as shown in Exhibit O1, N. of T., pages 700-734, inclusive. This exhibit deals with the respective years from the first of January of one year to the first of January of the succeeding year, and thus accounts for the slight variation in amounts.

The defendants met the allegation of misapplication of receipts from operation of road, from loans and from bonds, by offering in evidence the Exhibit O1, a statement of receipts and expenditures for the respective years, beginning January 1, 1903, and ending January 1, 1916, (N. of T., pp. 698, 699, and Exhibit O1, pp. 700-734, incl.) These give by the month the amounts of receipts from fares, baggage, etc., receipts from loans, miscellaneous receipts, and the receipts from the bonds, together with the amount of expenditures under their various headings.

For the purposes of plaintiffs' case, it is not sufficient to merely find what the gross earnings, as relating to the respective years, are, or what the increase of indebtedness during such years was. We must also find that the officers of the defendant company "have wasted and misapplied moneys received from the operation and the promulgation of bonds and notes." This allegation the plaintiffs have failed to establish. The defendants, in the exhibit just mentioned, together with the other evidence in this case, have accounted for the receipts and disbursements of the moneys of the company, for the periods of time covered by the bill. The evidence given on the part of the plaintiffs consists almost entirely of exhibits and the testimony of George H. Gerber, a former President, Howard E. Ahrens, President, George B. Schaeffer, Treasurer, and F. S. Kinsey, bookkeeper of the Allentown and Reading Traction Company. These witnesses were called as if on cross-examination. When, therefore, they were called upon by plaintiffs to testify to items as of a time prior to the first Monday of November, 1902, to items and matters that bore, not upon the operation of the railways and to the sale of its bonds, and the creation of loans, but to the construction of the Allentown and Reading Traction Company from the very beginning of the first company's charter in 1896, to items of expenditure beginning December 13, 1898, to construction, management and issuance of bonds (the \$200,000 issue), by officers of the Kutztown and Fleetwood Railway Company, to the management and issuance of bonds of the Keystone Electric Light, Heat & Power Company, and to the management and expenditures of the Dorney Park Amusement Company, all these being separate corporate bodies under agreements or leases with the Allentown and Reading Traction Company, but retaining the right of management of their respective corporations, with the exception of the Kutztown and Fleetwood Street Railway, which, after the construction thereof, was passed over to the Allentown and Reading Traction Company, it was evident to the Court that the defendants were not prepared for this wide range of evidence and were taken by surprise. It was for this reason that during the hearing a number of recesses were taken to enable them to examine the books of the company upon matters not considered by them as relevant to the issues raised by the pleadings. All the items of Exhibit "EE1," construction account (N. of T., pp. 1083 to 1123), amounting to \$316,918.26, are items of expenditure made by the company in construction prior to the first Monday of November, 1902. This is true of many of the other exhibits. Practically all the testimony as found on pages 343-347, 365-435, 691-694, and 770-892, relates to the various matters of construction. The testimony on

pages 53 to 65 refers to the management of the Kutztown and Fleetwood Company in the building of its road. The testimony on pages 68-110 and 320-338 relate to the management of the Keystone Electric Light, Heat & Power Company.

Mr. Kinsey was bookkeeper only from September 15, 1903. It was found in the course of the trial that he was not familiar with the entries on the books of the company prior to that time (N. of T., p. 781). The mere fact that when the various statements, as found upon the books of the company, of a time prior to September 15, 1903, were inquired into by plaintiffs' counsel, Mr. Kinsey was not able to say where in the books of the company certain of these items were entered in detail, and that he could not explain them, by no means warrants the Court in finding that these items were fictitious assets placed there to hide the misappropriations by the officers of the funds of the company and to conceal the company's alleged insolvency.

Plaintiffs' counsel, in requests for findings of fact 29, 30, 31, 33, 34, 35, 36; 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 49, 56, 57, 58, 62, and 63, inter alia, have asked us to find that the various sums contained in these requests amount to \$336,-314.50 and are fictitious assets. All these requests prior to that contained in the forty-second, relate to items of payment prior to the first Monday of November, 1902. The evidence does not support a finding that any of the items specified in these requests are fictitious assets. Some mistakes were made by the bookkeeper in the failure at times to enter certain items in the books of the company in its earlier history, which mistakes, upon discovery, were rectified by the entry thereof at a subsequent date.

"A receivership is a preventive, not a punitive, measure. 'Courts do not appoint receivers as a punishment for past dereliction, nor because of past dangers. Receivers are appointed because of present conditions, and well-founded apprehension as to the future.'" Pomeroy's Equity Jurisprudence, Vol. 4 (4th Edition), § 1542. Also in *Barrie vs. National Portland Cement Co. et al.*, 14 Dist. Rep. 816, we have (page 817): "In determining an application for a receiver 'the Court will look to the present condition, and what may be done in the future, rather than what has been done in the past. Receivers are not appointed to punish past derelictions of duty or because of past dangers.' Alderson on Receivers, 74."

The amount realized from the sale of the first and second consolidated bonds was not equal to their par value. The testimony shows that the company received full market value for these bonds (N. of T., pp. 414, 415), including those given to Ahrens & Brother in payment of work that it did in construction, or for moneys loaned by Howard E. Ahrens to the

company. The fact that Howard E. Ahrens was one of the directors of the Allentown and Reading Traction Company and at the same time a member of the firm of Ahrens & Brother, did not debar the firm from payment for work done by it for the corporation. "There is no sound principle of law or equity which prohibits one or more of the directors of a corporation from entering into contracts and dealings with the corporation, provided they act in good faith, and provided there be a quorum of other directors on the other side of the contract, so that the vote of the interested director is not necessary to the adoption of the measure; and even in the latter case the contract is good at law. In other words, a director is not debarred, by reason of his office, from entering into a contract with the corporation, but the contract is subject to the principle that where he appears on both sides of it, it will be closely scrutinized in equity, and set aside unless made in that entire good faith which the law demands of this species of fiduciary. Even where the majority of the stockholders are personally interested in a contract which they have authorized on behalf of the corporation, this does not render the contract void per se; it is still good at law, though voidable in equity in case of say fraud or unfairness at the suit of the corporation, or of stockholders suing in its behalf: Thompson's Commentaries on the Law of Corporations, Vol. 3, § 4059. In *Kendall vs. Klapperthal Company*, 202 Pa. 596, it is held: "If directors of a corporation supply the latter with money to meet its legitimate needs, and the money so furnished is properly used in carrying on the corporate business, they are entitled to recover from the company the value of the money so supplied and used." In *Twin Lick Oil Company vs. Marbury*, 91 U. S. 587, on page 589, Mr. Justice Miller says: "While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open, and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given."

Plaintiffs called, as one of their witnesses, Albert W. Sharp, a certified public accountant since 1912, and who has been an accountant since 1907. His testimony is found on pages 1265 to 1272. He testified that he had made an examination of the books of the company, and then gave the con-

clusion that the books were not complete, stating that they were deficient in respect to \$100,000 at least. There was no testimony by him that, other than this, there was anything wrong with the books. When asked to go into details as to the \$100,000 (p. 1266), he referred to the three items of construction as found in the exhibit on notes of testimony, 1115, of November 30, 1901, said sums being respectively \$10,193.39, bills payable account; \$12,380, old notes paid; and \$16,000, old notes paid. These amount to \$38,573.37. These items have been considered, and, as we have already said, there is no evidence to establish that they were in any way fictitious assets or that they do not represent values and moneys actually paid for legitimate purposes. His only other evidence is with reference to an inventory item of \$18,014.22 (p. 1868), and items of \$354.44 and \$5,076.43, concerning which he states that Mr. Gerber, in his testimony as to these amounts, was not correct in his theory in testifying concerning them. If there was the gross mismanagement, creation of fictitious assets upon the books, and the misappropriations of the large sums as claimed by plaintiffs, we naturally would have expected from this witness more light upon the subject than he gave us.

There was no attempt made to establish the allegation that sixty per cent., or any other per cent. of the gross earnings, as averred in paragraph seven of plaintiffs' bill, is an ample allowance for the cost of operation. Neither was it shown that the indebtedness was increased without any addition to the railroads or equipment to account for the same.

The item of \$126,707.08, an item of real estate, averred in paragraphs seven and fourteen, alleged to have disappeared from the company's assets, relates to the Dorney Park property. This item consists of an amount actually paid for Dorney Park, buildings thereon erected, and moneys expended upon the park. The evident purpose of this park and the expenditures thereon for attractions, was to increase the travel over its road to this park. While the amount is large, there is nothing in the evidence to show that the money thus expended, was not warranted. It was also clearly shown that this Dorney Park property is still in the possession of the Allentown and Reading Traction Company, and has not been disposed of (N. of T., 977, 978).

The item of nearly \$100,000, complained of in paragraph 7, was an amount placed in the report for the year ending the first Monday of November, 1903, by the bookkeeper, Mr. Kinsey, and the attorney, Mr. Lark, under the circumstances as shown by the evidence on pages 441, 442, 975-977, 982, and 983. The evidence does not show that with reference to this item there was any wrong-doing on the part of the officers of the company.

The complaint in the bill that the \$750,000 mortgage and the \$300,000 mortgage were executed without the consent of the Kutztown and Fleetwood Street Railway Company and in fraud of the rights of the stockholders of the company, is not supported by evidence or by law. The agreement under which the Allentown and Reading Traction Company had procured the Kutztown and Fleetwood Railway Company contains no provision that the Allentown and Reading Traction Company does not retain the right to mortgage its property when the necessities of the corporation require it. The issuance of these bonds was known to both Mr. Carson and Mr. James W. Shepp, the original owners of the shares of stock represented by two of the plaintiffs in this suit (N. of T., pp. 914, 915). Neither do the terms of the mortgages (N. of T., 517-531, and 582) in any way interfere with the rights of the Kutztown and Fleetwood Street Railway Company, or attempt to mortgage other than the rights of the Allentown and Reading Traction Company.

There was no evidence submitted to sustain the averment in paragraph 18 that the "Allentown and Reading Traction Company has grossly neglected to maintain the physical condition of the railway, of the said Kutztown and Fleetwood Street Railway Company." Neither are the discrepancies between the books and accounts kept by the Allentown and Reading Traction Company and the reports filed by the company such that they in any manner jeopardize the charter of the defendant company.

One of the allegations upon which is based the application for a receivership is the insolvency of the company (paragraph 17). "The appointment of a receiver does not necessarily follow upon the insolvency of a corporation and will not be made unless it is also shown that loss will ensue to the parties in interest if the persons or officers in the present control and management of the affairs are not superseded." 34 Cyc. 90. The evidence does not establish the insolvency of the defendant company. "Statutory insolvency is generally determined as an inability to pay debts when due or demandable." *Finch Mfg. Co. vs. The Stirling Co.*, 187 Pa. 596, 601, 602.

The most decisive, conclusive and best evidence disproving the general averments that "the charter of the said company has been placed in jeopardy and is liable to be forfeited (paragraph 19)" and that the Allentown and Reading Traction Company is insolvent, is the fact that although the bill asking for the appointment of a receiver was filed on February 5, 1913, six years and six months ago, the company is still operating under its charter and at no time, so far as the matter has been brought to the attention of the Court, either at the time of the hearing or since, has it defaulted in the payment

of interest upon any of its bonds, or in the payment of the just claims of the company.

The appointment of a receiver must be determined as of this date: *Hiester et al. vs. Gougliersville Band et al.*, 7 Berks Co. Law Journal, 29, 32; *Barrie vs. National Portland Cement Co. et al.*, supra; *Pomeroy's Equity Jurisprudence*, supra (p. 1542). "The appointment of a receiver is the exercise of a power in aid of a proceeding in equity, and is the subject of sound discretion. The Court must be convinced that it is needful and is the appropriate means of securing a proper end. Such an appointment is a strong measure, and not to be exercised doubtfully. Where a party is clothed with title and possession such as are conferred by a lease in writing, and is in the enjoyment of rights apparently legal, a receiver will not be appointed unless under urgent and peculiar circumstances. The plaintiff must show a clear right in such a case, or a prima facie, with such attending circumstances of danger or probable loss as will move the conscience of a chancellor to interfere." *C. and A. Oil and Mining Co. vs. U. S. Petroleum Co.*, 57 Pa. 83, 91. See also *Fox vs. Curtis et al.*, 176 Pa. 52, 58; *Power vs. Grogan*, 232 Pa. 387, 395. This is especially true when the application is for the appointment of a receiver for a corporation. "As a rule of equity practice the courts are very reluctant to appoint receivers, upon the idea that it is a practical displacement of the board of directors. It is an assumption of the functions of the directors. It displaces the board of managers placed there by the stockholders, who sustain the relation of trustees for the stockholders, trustees for the corporation, and trustees for its creditors; and, before the Court will take charge of the corporation, and thus displace its chosen directors and managers, it ought to have the clearest evidence of the absolute necessity for such extraordinary action for the protection of the creditors, stockholders, and all parties concerned. The subjection of corporate property and franchise to the custody of a receiver is a suspension in a greater or less degree of the powers of the corporation, in addition to devolving on the Court often the continuance of the business of the corporation, and this is the explanation of the greater reluctance to appoint receivers over them and their property, than in the case of individuals:" 34 Cyc. 79.

We consider that the evidence in this case does not warrant us in granting any of the prayers contained in plaintiffs' bill.

ANSWERS TO PLAINTIFFS' REQUESTS FOR FINDINGS OF LAW.

FIRST REQUEST FOR FINDING OF LAW.

This is refused:

1. It is not a proper request in that it is argumentative.

FIFTH REQUEST FOR FINDING OF LAW.

This is refused. The conclusion is based upon the assumption stated in the request that the officers and directors of the Allentown and Reading Traction Company have misappropriated the corporate moneys, have issued bonds to themselves without consideration, have paid themselves interest on such bonds, and have impaired the capital of the traction company. This assumption is not established by the evidence.

CONCLUSIONS OF LAW.

1. The evidence is not sufficient to establish the various allegations of wrong-doing by the officers and directors of the Allentown and Reading Traction Company, as contained in the respective paragraphs of plaintiffs' bill.

2. The evidence is not sufficient to warrant the Court to grant any of the prayers contained in plaintiffs' bill.

3. The costs of the proceeding shall be paid by the plaintiffs.

AND NOW, August 11, 1919, the Prothonotary is directed to enter a decree nisi in accordance with the foregoing decision, and forthwith to give notice thereof to the parties or their counsel of record, sec. reg.

BERKS CO. vs. LIEBOVITZ & SONS.

Taxation—County Taxes—Assessment—Machinery—Act 15 April, 1834, P. L. (1833-34) 511, sec. 4—Act 29 April, 1844, P. L. 497, sec. 32.

1. Machinery owned by A and set up in a building leased by him with the right and privilege of removing it at any time are taxable as real estate for county purposes as the property of A.

2. The Act 15 April, 1834, P. L. (1833-34) 511, sec. 4, makes taxable as real estate, for county purposes, "manufactories of all descriptions," and the Act 29 April, 1844, P. L. 497, sec. 32, subjects to such taxation ". . . all real estate, to wit, . . . manufactories of all kinds."

In the Court of Common Pleas of Berks County.

No. 36 May Term, 1919.

Case stated.

Ira G. Kutz for plaintiff.

B. Morris Strauss for defendant.

Opinion by Endlich, P. J., June 21, 1919.—Under the head of real estate, the assessor of the borough of Mohnton, in this county, returned for taxation for county purposes, as the property of defendants, a certain number of sewing machines, valuing them at \$600. These sewing machines are set up by the defendants in a building which they rent from one Stamm, the owner thereof, for the term of one year, the machines to be and continue the exclusive property of defendants, with the right and privilege to defendants of removing them at any time. They are used by defendants to sew together shirts out of parts ready cut and shipped there by the defendants from other places. The land and the building are assessed for taxation, of course as real estate, against the owner. The defendants appeared before the Board of County Commissioners on the day fixed for an appeal from said assessment, contending that the assessor had no right to assess said sewing machines as real estate against the defendants. The County Commissioners, however, affirmed the assessment as made, and from it the defendants have appealed. The parties agreed to a case stated, setting forth the facts recited, and in the last paragraph stipulating as follows:

"The question for the decision of the Court is whether the said sewing machines are liable for taxation against S. Liebovitz & Sons under the Acts of Assembly of 1834 and 1844. If the Court be of the opinion that the said S. Liebovitz & Sons are taxable on the value of the said sewing machines, then judgment to be entered in favor of the plaintiff; but if not, then judgment to be entered in favor of the defendants. . . ."

On that inquiry, as pointed out in *Bemis vs. Shipe*, 26 Pa. Super. Ct. 42, 45, the criterion is not whether, as between the landlord and the tenant, the machinery, etc., involved is to be treated as personalty or realty. The question is one of statutory enactment. The Act 15 Apr. 1834, P. L. (1833-34) 511, sec. 4, makes taxable, as real estate, for county purposes, "manufactories of all descriptions," and the Act 29 Apr. 1844, P. L. 497, sec. 32, subjects to such taxation ". . . all real estate, to wit, . . . manufactories of all kinds." Under these enactments, machinery in manufactories has been uniformly held liable to county taxation as real estate, not only when its owner is also the owner of the land and building, as in *Patterson vs. Delaware Co.*, 70 Pa. 381, but likewise where the land and building belong to one, and the machinery, etc., to another party occupying the land as lessee. Thus, in *Luzerne Co. vs. Galland Bros. & Co.*, 3 Kulp 11, there was a house and lot owned by one Fitzpatrick, but leased to the defendants for manufacturing purposes, and certain machinery belonging to them had been set up and was operated by them. It was held subject to taxation against them as real estate. And so in

the case already cited of Bemis vs. Shipe, 26 Pa. Super. Ct. 42, followed in Guthrie vs. Dry Goods Co., 47 id. 384, (where the value of the machinery was assessed against the land owner). See also Penna. Stave Co.'s App., 236 Pa. 97, where a lessee of the land was held liable to taxation upon it and structures placed upon it by the lessee under its lease, which, as in both of the foregoing cases and in the present case, gave the lessee the right to remove them. The plain teaching of the decisions referred to seems to be that the Acts of 1834 and 1844 make manufactories, with the machinery, etc., contained in them, realty for purposes of county taxation; i. e., the land as realty, and the machinery, etc., upon it as realty also, and if it belongs to the lessee it is assessable and taxable against him as part of the realty.

If this is the correct view, then it is clear that the defendants have no ground for complaint against the assessment they seek to avoid, and that the conclusion upon the case stated must be in favor of the plaintiff.

Judgment is directed to be entered upon the case stated in favor of the plaintiff and against the defendants.

HAMMEKE vs. READING NATIONAL BANK

Bills and Notes—Collateral—Misuse of Collateral by Bank.

A bank holding stock as collateral security for a promissory note is bound to preserve it and apply it for the benefit of the assignor, and is liable to the assignor for any loss incurred by its misuse.

In the Court of Common Pleas of Berks County.

No. 26 May Term, 1919.

Action in assumpsit. Motion for judgment on affidavit of defence in lieu of a demurrer.

W. K. Stevens for defendant.

George J. Gross for plaintiff.

Opinion by Endlich, P. J., June 21, 1919.—The defendant, under sec. 20 of the Practice Act, 1915, has filed an affidavit of defence in lieu of a demurrer, averring that "the plaintiff, in his statement filed, has set forth no cause of action under which he has suffered any injury," and asking for the entry of judgment accordingly. Of course, the facts to be assumed by the Court must be gathered from the plaintiff's statement. It thereby appears that on Nov. 26, 1917, the plaintiff deposited to his own credit in the defendant bank \$745, of which \$600 were the proceeds of the discount of a note for that amount which on that day he gave to the defendant, depositing with it,

as collateral security, four shares of the Allentown National Bank stock belonging to him, (with blank power of attorney to transfer, etc.), under an agreement which provided that, upon default of payment of the note when due, the defendant might sell the collateral without previous demand or notice, either at brokers' board or at public or private sale, and apply the proceeds to the payment of the indebtedness. On the same day the plaintiff loaned to one Capallo \$600 of the amount he thus had in bank, and later checked out \$100 more. The note came due on Dec. 27, and was not then paid. The custom of the Reading banks holding notes of this character is averred to be to carry such notes after maturity, without protest or notice to the maker, until he pays the same or the bank makes demand for payment; and this custom was relied upon by the plaintiff in his dealings with the defendant. No demand for payment of the note was ever made upon plaintiff by the defendant, either at its maturity or subsequently. On Jan. 3, 1918, Capallo, without the knowledge of and without authority from the plaintiff, called at the defendant bank and deposited of his own funds to the credit of the plaintiff a sum sufficient, with what was on deposit to the plaintiff's credit, to make up \$600. He thereupon asked that said amount be appropriated by the bank to the payment of the plaintiff's note, and that the collateral held by defendant be handed over to him, Capallo. Without notice to or permission by the plaintiff, the owner of the collateral, the bank complied with Capallo's request, charged up the plaintiff's note against his credit, and delivered the collateral (with the blank power of attorney, etc.), to Capallo, the market value of the stock at the time being from \$175 to \$200 per share. "Shortly thereafter," Capallo obtained a loan to himself from the First National Bank of Reading of \$600, pledging as collateral to his note therefor the four shares of Allentown National Bank stock he had received from the defendant, together with a Liberty Bond for \$50 owned by him, Capallo. Of all these transactions the plaintiff knew nothing until some time in March, 1918, when he immediately made demand upon the defendant for return of his stock. To this demand the defendant's cashier replied that they had sold the stock to Capallo as the collateral note authorized them to do. Thereupon plaintiff entered into negotiations with the First National Bank for the return of the stock, finally receiving it from that bank upon payment by him to it of \$553.17. In this action he is suing the defendant for the loss alleged to have been incurred by him through the negligence of the defendant in handing over his stock to a party not entitled to it.

In *Bank vs. Nelson*, 255 Pa. 455, at pp. 460-1, the Supreme Court, citing *Muirhead vs. Kirkpatrick*, 21 Pa. 237, and *Hanna vs. Holton*, 78 id. 334, said:

"The holder of collateral security is bound to preserve it. . . . and apply it for the benefit of the assignor. . . . His duties in respect to it are active. . . . He alone is empowered to receive the money to be paid upon it, and to control it in order to protect his right under the assignment. This is the ground of the creditor's liability for the collateral. . . . It is therefore settled in this State that where the collateral is lost . . . through the supine negligence of the creditor, he must account for the loss to his debtor, who invested him with its entire control."

And in *Bank v. Fisher*, 65 Pa. Super. Ct. 369, at p. 372, the same doctrine is reiterated in substantially the same language. It would seem to be applicable to and controlling of the present case as it now comes before the Court. It is, indeed, contended on the part of the defendant that, since the plaintiff was indebted to the defendant bank in the sum of \$600, and Capallo deposited \$555 of his own money to the plaintiff's credit, the latter, paying but \$553.17 to the First National Bank for the release of his collateral, suffered no loss by the defendant's surrender of the same to Capallo. The answer seems to be that Capallo was a debtor to the plaintiff in the sum of \$600, and was bound to give him, or place to his credit, not only \$555, but the entire \$600. Nor, as such debtor, was he entitled, in return for so doing, to the possession or ownership of the collateral pledged by the plaintiff to the bank. It is plain that it was the defendant bank's duty, on the payment of plaintiff's debt to it, to return to him his stock held by it as collateral. The plaintiff's debt to the defendant was wiped out on Jan. 3, and from that time until "shortly thereafter," when Capallo pledged the plaintiff's stock to the First National Bank for a loan of \$600, there was certainly nobody entitled to the collateral except the plaintiff, unless indeed there was a sale of it by defendant to Capallo. In the absence of a sale, had the stock been returned to plaintiff or retained by the bank for him, he would have recovered it without any further cost to him. In consequence of the defendant's action, he was obliged to incur an expenditure of \$553.17 in order to repossess himself of what, upon the facts as we are to assume them, ought to have come back to him without any outlay by him whatever. Of his right, as well as of Capallo's lack of right, the defendant bank can, under the circumstances set forth in the statement, hardly have been ignorant. At any rate it was put upon inquiry, which, if made, would readily have led to such knowledge, and the knowledge to be gained by which is therefore imputed to the party on whom the duty to make it rests: *Hood v. Fahnestock*, 1 Pa. 470, 474; *Knouff v. Thompson*, 16 id. 357, 364; *Wilson v. McCullough*, 23 id. 440, 446; *Hill v. Epley*, 31 id. 331, 336; *Maul v. Rider*, 59 id.

167, 171; Hottenstein vs. Lerch, 104 id. 454, 461; Jeanes v. Hizer, 186 id. 523, 527; R. R. Co. v. Pa. Co., 222 id. 573, 585.

It is not necessary at this time to discuss the question of the measure of damages. It is enough, for present purposes, that a cause of action sufficiently appears by the plaintiff's statement. If there was a real bona fide sale by the defendant to Capallo of the collateral stock, that might be the end of plaintiff's demand. But no such fact is averred in the statement or indicated by what is averred therein, in such manner as to make it determinable as a fact upon the record as it now stands. It is perhaps not needful to add, in view of the custom of the banks above referred to and of plaintiff's reliance upon it, that his failure to look after his note and collateral until March is in itself no ground for visiting him with the loss of his stock, and no justification to the defendant for letting it go as it did.

And now, June 21, 1919, it is adjudged that, upon the question of law raised by the defendant's affidavit of defence, defendant is not entitled to judgment; that its application therefor is refused; and that the defendant be at liberty to file a supplemental affidavit of defence to the averments of fact of the plaintiff's statement within 15 days from this date.

READING vs. MOERS.

Municipal Claims—Loss of Claim—Statutory Period—Revival—Act 20 June, 1911, P. L. 1076, sec. 1.

Under the Act 20 June, 1911, P. L. 1076, sec. 1, providing for the enforcement of municipal liens, a claim will be wholly lost if not revived by scire facias within five years following the date on which a writ of scire facias was issued thereon.

In the Court of Common Pleas of Berks County.

No. 77 April Term, 1918.

Rule for judgment.

Joseph R. Dickinson for defendant and rule.

Fred A. Marx, Assistant City Solicitor, and Wellington M. Bertolet, City Solicitor, for plaintiff.

Opinion by Endlich, P. J., June 21, 1919.—On April 18, 1908, the city of Reading filed a claim for a sewer assessment against premises then owned by John F. Moers and now by Mary E. Moers Oldham, the terre tenant named in the writ as Mary E. Moers. The claim was entered to No. 1670 Apr. T. 1908. On March 15, 1913, a scire facias was issued upon it to No. 142 Apr. T. 1913. No verdict was recovered and no judg-

ment entered in the scire facias just mentioned. On March 23, 1918, the present alias scire facias was issued. It is contended on the part of the defendant that the failure to prosecute the writ of scire facias to verdict or judgment is fatal to the claim of the city, and that that claim, by reason thereof, is wholly lost to it under sec. 1, Act 20 June, 1911, P. L. 1076.

The decision in *Scranton v. Genet*, 232 Pa. 272, a case arising under sec. 10 of Act 4 June, 1901, P. L. 364, seems in principle conclusive in defendant's favor on this question. It is true that the present proceeding is not under the Act of 1901, but under the Act of 1911, which amends sec. 10 of the Act of 1901. The material portion of the latter was as follows:

"Upon each tax or municipal claim a writ of scire facias . . . must issue within five years from it filing, and the verdict must be recovered or judgment entered on the scire facias within five years after it is issued. Final judgment must be entered on the verdict within five years after its recovery. After judgment is entered, it must be revived by writ of scire facias to revive the judgment, or by judgment thereon within each recurring period of five years. If a claim be not filed within the time aforesaid, or if it be not prosecuted in the manner and at the times aforesaid, it shall be wholly lost. . ."

The amendment of 1911 makes this section to read as follows:

"Such tax, municipal, or other claim, if filed within the period aforesaid, shall remain a lien upon said properties until fully paid and satisfied: Provided, however, that either a suggestion of non-payment and an averment of default . . . be filed in cases of tax claims, either before or after judgment on the scire facias, and in cases of other than tax claims after judgment on the scire facias, or else a writ of scire facias . . . be issued to revive the same, within each period of five years following—(a) the date on which said claim was filed, (b) the date on which a writ of scire facias was issued thereon, (c) the date on which any judgment was entered thereon, (d) the date on which a previous suggestion or non-payment and default was filed thereon, or (e) the date on which a judgment of revival was obtained thereon.

"If a claim be not filed within the time aforesaid, or if it be not prosecuted in the manner and at the time aforesaid, it shall be wholly lost."

In the light of *Scranton v. Genet*, *supra*, it is readily seen that, at any rate so far as concerns other than tax claims, this enactment, very like the one of 1901, requires that the municipality take the steps pointed out by the statute to enforce or continue the claim; that, within certain designated periods, the proceeding be pushed to a finality; and that failure to

comply with these requisitions destroys the claim. In the present case, as already stated, a scire facias issued to No. 142 Apr. T. 1913, was not prosecuted to a verdict or judgment within five years from the date of its issuance. It follows that the claim is lost to the city and cannot be the basis of any further proceedings for collection.

And now, June 21, 1919, it is adjudged that, upon the question of law raised by defendant's affidavit of defence, the defendant is entitled to judgment, and the rule for judgment is made absolute.

SERENCSE vs. FILBERT et al.

Municipalities—Cities of the Third Class—Power to Regulate Collection of Garbage—Exclusive Right to Remove—Act 27 June, 1913, P. L. 277, Art. V, sections 39 and 49.

1. A city of the third class can lawfully put the business of collecting and removing the garbage within the city limits into the hands of a contractor and decline to license any other party.

2. Cities of the third class, by virtue of sec. 39 of Art. V of the Act 27 June, 1913, authorizing cities "to make regulations to secure the general health of the inhabitants and to remove and prevent nuisances," as well as by virtue of sec. 49 of Art. V of the same act authorizing the Council "to make all such ordinances, by-laws, rules and regulations not inconsistent with the the Constitution and Laws of this Commonwealth as may be expedient or necessary . . . for the maintenance of the peace, good government, safety and welfare of the city," are empowered to ordain regulations for the collection and removal of garbage.

3. Without the right to grant exclusive right to collect and remove garbage, a municipality's power to regulate and deal with it would be imperfect and futile.

4. The existence of the power of a city to regulate the collection and removal of garbage does not hinge on whether or not the collection and removal of garbage is a nuisance.

5. In no constitutional sense does the granting by a city of an exclusive right to collect and remove garbage involve the taking of property for public use without adequate compensation, or constitute a restraint upon trade.

6. A party affected by a city's exercise of its power to grant an exclusive right to collect and remove garbage cannot escape from it by showing that he, in respect to garbage collected by him, is under contract obligation to the owners of the garbage, or that he is conforming to the means, methods, etc., prescribed by the city's ordinance or contract.

7. A city, in the exercise of its power to regulate the collection and removal of garbage, has a discretion not controllable by the Court, the question being not one of law but of practical expediency.

8. A municipality's possession of the power to regulate the collection and removal of garbage implies a duty to exercise it, if expedient or necessary or advantageous to the public, whereof the municipal authorities are the judges.

In the Court of Common Pleas of Berks County.

No. 50 June Term, 1919.

Mandamus. Return and traverse.

Joseph R. Dickinson for plaintiff.

Wellington M. Bertolet, city solicitor, for defendants.

Opinion by Endlich, P. J., July 7, 1919.—To the alternative mandamus issued in this case on the plaintiff's petition, the defendants made a return denying certain of plaintiff's allegations of fact, and the plaintiff subsequently filed a traverse. The matters, however, which are undisputed or expressly admitted appeared so numerous and controlling, that, when the case was called for hearing, it was argued as involving merely a question of law, any disagreement as to facts being ignored for the time being, with the understanding that, if they became material in the decision of the controversy, they would then be taken up, tried and passed upon. In other words, the argument proceeded much as if the return raised no issue of fact and had been formally demurred to.

The City Ordinance of 28 March, 1898, regulated the collection and removal of garbage in the city of Reading. and in sec. 10 authorized the department from time to time to advertise for proposals in accordance with the ordinance, with a view to formulating and entering into contracts for that purpose, which in every instance should be for neither more nor less than one year. By Ordinance of 24 Sept., 1902, this section was amended "to read as follows," omitting the reference to and restriction of the contract to one year and thereby repealing the same: See *Fowler v. Columbia Co.*, 18 Pa. C. C. Rep. 653. A further Ordinance, approved 16 April, 1919, declares it unlawful for any one, except the party contracting with the city, to use the public streets, alleys or highways of the same for the purpose of collecting garbage without first having obtained a permit from the Board of Health. About Sept. 5, 1917, the city entered into a five-year contract for the collection and removal of the garbage, presently carried on by the Reading Reduction Co. under an arrangement recognized by the city, with the original contractor. If in any minor particulars this contract departs from the directions of the ordinance, the plaintiff, who was a bidder for it, can hardly be regarded as the proper party to impeach it on that ground.

About six miles from the city the plaintiff has a piggery, and heretofore has been procuring as food for his swine the garbage of certain hotels, restaurants, etc., within the city and removing it, using, as he asserts, substantially the means, methods and appliances prescribed by the city ordinance above referred to and by the contract now in force. He has applied to the Council, acting as a Board of Health, for a license or permit to continue this practice, and has been refused. Claiming to have a right to a license, etc., beyond

the power of the city to deny, he has instituted this proceeding. The single issue in it is whether the city can lawfully put the business of collecting and removing the garbage within the city into the hands of a contractor and decline to license any other party. The discussion which that question would ordinarily invite is rendered unnecessary and unprofitable here by the many carefully decided cases in various jurisdictions dealing with it from every point of view.

The power of the city of Reading, a city of the third class, to ordain regulations on the subject of garbage must be sought for in Art. V, sec 3, cl. 36, of the Act 23 May, 1889, P. L. 277, which authorized the city "to make regulations to secure the general health of the inhabitants and to remove and prevent nuisances,"—a provision re-enacted in the Act 27 June, 1913, P. L. 937, Art. V, sec. 39. It is pertinent also to refer to sec. 49 of Art. V of the last mentioned Act, authorizing the Council "to make all such ordinances, by-laws, rules and regulations not inconsistent with the Constitution and Laws of this Commonwealth as may be expedient or necessary . . . for the maintenance of the peace, good government, safety and welfare of the city."

In Pennsylvania, the cases which make for the city's power to do what the Council of Reading has undertaken to do in this case are *Butler Bor. vs. Logan et al.*, 19 Distr. R. 952; *Harrisburg vs. Martin*, 20 id. 325; *Marple vs. Pfanner*, 21 id. 847. All of them are extremely close to the one now under consideration; and that of *Harrisburg vs. Martin*, *supra*, is, since the passage of the Ordinance of 16 April, 1919, as nearly as can be on all fours with it. Among those in other jurisdictions, going at least as far back as 1828: *Vandine's Case*, 6 Pick. (Mass.) 187, and leading to essentially the same results, are *California Reduction Co. vs. Sanitary Reduction Works*, 199 U. S. 306; *Gardner vs. Michigan*, *ibid.* 325; *Grand Rapids vs. DeVries*, 123 Mich. 570, 82 N. W. 269; *Urbach vs. Omaha*, 101 Neb. 314, 163 N. W. 307; *O'Neal vs. Harrison*, (Kan.) 150 Pac. 551; *State vs. Orr*, 68 Conn. 101; *Rochester vs. Gutberlett*, 211 N. Y. 309, 105 N. E. 548; *Atlantic City vs. Abbott*, (N. J.) 62 Atl. 999. Other cases more or less in point might be added to those above cited, but it is needless to enumerate them. Looking at those mentioned and what they severally and collectively decide, the sum total of their teaching is that, without the right to restrict to one or more persons the collection, etc., of the garbage, the power to regulate and deal with that important item would be imperfect and futile; that the existence of the power does not hinge on whether or not the collection, etc., of the garbage is a nuisance; that in no constitutional sense does it involve the taking of property without due process of law, or the taking of private prop-

erty for public use without adequate compensation, or in any legitimate sense a restraint upon trade; that a party affected by the exercise of the power cannot escape from it by showing that he, in respect to garbage collected by him, is under contract obligation to the owners of the garbage, or that he is conforming to the means, methods, etc., prescribed by the city's ordinance or contract; that in the exercise of its power the city has a discretion not controllable by the Court, the question being not one of law but of practical expediency; that the city's possession of the power implies a duty to exercise it, if expedient or necessary or advantageous to the public, whereof the municipal authorities are the judges; and that statutory provisions neither more specific nor broader than those contained in the Acts of 1889 and 1913 and above quoted confer the power here attacked by plaintiff and maintained by defendants.

On the other side, the learned and painstaking counsel has referred us to three cases, all of them arising in this State, to wit, *Kussel vs. Erie*, 8 Distr. R. 105; *Meadville vs. Bradby*, 22 Pa. C. C. Rep. 163; and *Philadelphia vs. Lyster*, 3 Pa. Super. Ct. 475. In the first of these cases, the action of the city was held to be in restraint of trade and to amount to the taking of property without due process of law. The ordinance there assailed was, however, also declared invalid because of a defective title, which robs the other grounds of much of their weight, the correctness of the judgment not depending upon those grounds. In the second case, the point decided seems to have been simply that the city may require persons removing garbage to take out a license. And in the last case,—a bill for an injunction against a party collecting garbage without a permit and carrying it through the city streets,—defendant's act was in the lower Court treated as a nuisance per se, or at least as capable of being declared a nuisance by the Board of Health. But the preliminary injunction granted by that Court upon those grounds was dissolved by the Superior Court. The relevancy of the case is therefore not apparent. There is here no question of nuisance per se or to be declared by the Board of Health. The question is one of the right and power of the city authorities to regulate and restrict the collection, removal and transportation through the city of the garbage regardless of whether it is a nuisance or not.

The conclusion seems to be inevitable that the weight alike of reason and authority is in favor of upholding the position of the city in this case, and that there are no issues of fact suggested by the pleadings capable of decisively affecting its disposition; and hence we feel constrained to give—

Judgment for defendants, with costs.

STRAUSE'S ESTATE.**Joint Tenancy—Survivorship—Act 3 March, 1812, 5 Sm. L. 395.**

1. While the right of survivorship as an incident of joint tenancy at common law has been established by the Act 31 March, 1812, 5 Sm. L. 395, it is not forbidden by the Act, nor made illegal in any way to create by grant or devise an estate with the same attribute of survivorship as joint tenancy at common law; and survivorship as an incident of an estate granted being still lawful, its creation becomes a question of intent.

2. Where A withdrew money from bank and redeposited it in the name of herself or B, her daughter, intending to create a joint tenancy, and that the survivor should take the fund, and A died, the title vested immediately and absolutely in B, who survived.

Gifts—Gift Inter Vivos.

3. To constitute a gift inter vivos two essential elements must combine; an intention to make the gift then and there, and such an actual or constructive delivery at the same time to the donee as invests the donee therewith.

In the Orphans' Court of Berks County.

Audit of the account of Howard M. Strause, administrator.

B. Morris Strause for the accountant.

Benjamin Y. Shearer for the claimant.

Opinion by Schaeffer, P. J., July 26, 1919.—Margaret Strause, the decedent, died on October 20, 1918, intestate, and letters of administration on her estate were granted by the Register of Wills to Howard M. Strause, the husband. The decedent left to survive her a husband, Howard M. Strause, and four minor children, viz.: Harry, Mildred, Naomi and Bessie Strause. The balance for distribution, as appears in the account of Mr. Strause, the administrator, is \$890.75. At the audit Daniel M. Hain, the husband and personal representative of Esther M. Hain, deceased, the mother of Margaret Strause, now deceased, appeared and claimed the whole of this fund, on the ground that Margaret Strause never had any title to the same.

The amount with which the accountant charges himself in this estate represents a deposit which was in the Farmers National Bank of this city, in the names of "Esther M. Hain or Margaret Strause." On October 25, 1915, Esther M. Hain deposited in the Farmers' National Bank the sum of \$1,100. On February 23, 1916, she checked out of this account \$1,025, and on the same day deposited a like amount in the savings department of the same bank in the name of "Esther M. Hain or Margaret Strause." When the latter deposit was made they were both present and signed their names on an identification card. Before her death, on October 10, 1918, Mrs. Hain had not withdrawn any money by check or otherwise from this joint account. Mrs. Strause, who died on October 20, 1918, had withdrawn the sum of \$75 from the account after the death of Mrs. Hain. Upon the death of Mrs. Strause, her adminis-

trator withdrew the balance of the deposit, \$1,033.26—this being principal and interest—and charged himself with it in this account. The question now is as to the ownership of said deposit; the estate of Mrs. Hain claiming that it belonged to her at the time of her death, and the estate of Mrs. Strause claiming that upon the death of Mrs. Hain it became her property.

We think that the evidence in this case shows that this deposit was the joint property of the said Esther M. Hain and Margaret Strause during their joint lives, and that upon the death of Esther M. Hain, the mother, the title thereto vested immediately and absolutely in the survivor, Mrs. Strause. Counsel for the estate of Mrs. Hain contends that since Mrs. Hain had the right to withdraw the whole amount of this deposit during her lifetime, she had not relinquished her dominion over it, and consequently she never parted with her title in her lifetime, and there was no delivery of the subject of the alleged gift. If the estate of Mrs. Strause, the decedent here, sought to sustain its right to the fund wholly upon the theory of a gift *inter vivos* from the mother Mrs. Hain to Mrs. Strause, there might be considerable difficulty in the way of concluding that Mrs. Strause had title to the deposit at the time of her death. The rule is well established in this State that to constitute a gift *inter vivos* two essential elements must combine; an intention to make the gift then and there, and such an actual or constructive delivery at the same time to the donee as divests the donor of all dominion over the subject, and invests the donee therewith: *Walsh's Appeal*, 122 Pa. 187; *Flanagan vs. Nash*, 185 Pa. 41. *Redse vs Philadelphia Trust Co.*, 218 Pa. 150; *Turner's Estate*, 244 Pa. 568, 572; *Grady vs. Sheehan*, 256 Pa. 377; *McHale, Administratrix vs. Toole et al.*, App. 258 Pa. 293.

The cases of *Flanagan vs. Nash*, *supra*, and *Grady vs. Sheehan*, *supra*, hold that where a person deposits his own money in a savings fund in the joint name of himself and another, under the stipulation that either may draw the fund, or the survivor may draw it, the other person at the death of the owner of the fund cannot, in the absence of any other evidence, establish title to the fund, either as a gift *inter vivos* or as a *donatio mortis cause*. In *Flanagan vs. Nash*, the deposit stood alone, disassociated from any other fact, and was admittedly the property of the decedent while in bank.

The case at bar is distinguishable from the cases cited, namely, *Flanagan vs. Nash*, *supra*, and *Grady vs. Sheehan*, *supra*, which show that the only purpose of changing the deposit and putting it in the name of both, was for matter of convenience or to make a testamentary disposition of the same. In neither of these cases does it appear that the survivor dur-

ing his lifetime had the right to draw the money and keep it as his own. But in this case the proofs show, that when Mrs. Hain withdrew the money from her individual account and then made a deposit of a similar amount in the joint name of herself and daughter, that her intention was to create a joint tenancy, and that the survivor was to take the fund.

The evidence presented at the audit shows that the deposit represents the same amount which was realized by Mrs. Hain from the sale of a property which she originally received from her daughter, Mrs. Strause, for the sum of one dollar. Mrs. Strause had inherited the property from her father, Mr. Koehler, who was the former husband of Mrs. Hain. Mrs. Hain during her widowhood lived with her daughter. While they lived together, the daughter conveyed said property to the mother for one dollar, subject to a mortgage of \$850, on the condition that Mrs. Hain was to enjoy it during her lifetime and after her death the daughter should have the property back again. This contract was not incorporated in the deed, but was orally made by the parties at the time the transfer was made in the presence and full hearing of the attorney, who prepared the deed. After Mrs. Koehler, the mother, married Hain she sold the property for \$1,875, paid off the mortgage and deposited the balance, \$1,100, in bank on October 25, 1915. At the time of the latter transfer the mother stated that she had received this property from her daughter to enjoy it only during her lifetime. The husband of Mrs. Hain, at first, refused to join in the transfer, for the reason as stated by him: "that he had no interest in the property." These proofs, which are undisputed, show, not only that there is grave doubt whether Mrs. Hain was the absolute owner of the fund realized from the sale of the house, which she deposited in her own name and subsequently withdrew and deposited in the joint names of herself and daughter, but that, assuming that she was the owner of the money, it was her intention when she changed the deposit to the joint account of both, to vest in the daughter a joint ownership with her of the deposit, because she recognized that she received this money through the daughter, and that it belonged to her as much as it did the mother. The deposit was in the name of both, and could be drawn by either. Both therefore were interested in it, while it might be safely paid to either. The transfer of the account to the two names was a gift of some kind to Mrs. Strause, because the bank clerk testified that Mrs. Strause had the right to check against the deposit, if she saw fit to do so. It seems to us that the facts and circumstances show the intent of the mother to make her daughter Mrs. Strause a joint owner with her in the fund, in consequence of which she took immediate title to the whole at the death of the mother.

While the right of survivorship as an incident of joint tenancy at common law has been abolished by the Act of March 31, 1812, 5 Sm. L 395, it is not forbidden by the Act, nor made illegal in any way to create by grant or devise an estate with the same attribute of survivorship as joint tenancy at common law; and survivorship as an incident of an estate granted being still lawful, its creation becomes a question of intent: *Redemptorist Fathers vs. Lawler*, Appellant, 205 Pa. 24. In *Grady vs. Sheehan*, supra 379, it was held that the full control which one has over his personal property includes the right to create such a joint ownership and survivorship either for a consideration or by gift. A joint tenancy in a bank deposit in the name of A or B—who are not husband and wife—has been frequently sustained in other jurisdictions. See *Farrelly vs. Emigrant Industrial Sav. Bank et al.*, 87 N. Y. Supp. 54; *Mack vs. Mechanics' & Farmers' Sav. Bank et al.*, 3 N. Y. Supp. 441; *Whitehead vs. Smith*, 32 Atlantic, 168.

Our conclusion that this is a joint tenancy is based on the assumption that Mrs. Hain, the mother, was the owner of the fund when it was deposited in the joint names of herself and daughter. This, however, does not clearly appear. In fact, the evidence does not warrant us in holding just who was the owner of the fund. It was, as the evidence shows, on joint deposit. But how it came to be placed jointly in the names of "Esther Hain or Margaret Strause" does not appear. Under these circumstances, being payable to either party, and Margaret Strause and her personal representative having withdrawn it, her estate is entitled to retain it.

The case of *Coulter vs. Rowe*, from Lancaster county, decided by our Supreme Court on June 21, 1919, and not yet reported, is very like this case. In that case it was held that when a certificate of deposit is made in the name of "Mary A. Flury or Julia J. Rowe" and Mary A. Flury dies, Julia J. Rowe is entitled to the fund, irrespective of its prior ownership, there being nothing to show that she was a trustee for the former owner. An examination of the paper books in that case shows that the deposit was originally in the name of Mary A. Flury, but subsequently was changed to Mary A. Flury or Julia J. Rowe.

Our conclusion is that the fund in question is the property of Margaret Strause's estate, and the distribution will be made accordingly.

HORN et al. vs. READING BASEBALL, etc., ASS'N. et al.**Injunctions—Sunday Baseball—Sunday Law.**

1. An injunction restraining defendants from playing baseball games on Sunday afternoons to the annoyance and special nuisance of the plaintiffs, residents of the districts surrounding the baseball park on three sides, will be granted where the evidence shows special injury to the plaintiffs by disturbing noises, by the driving of balls upon plaintiffs' properties, and by trespassing upon the same by persons seeking to recover the balls.

2. The lawfulness or unlawfulness of the games under the Sunday law is not a decisive question in such a proceeding. The significance of the fact that the games are played and the annoyances occur on Sundays is that, Sunday being a day of rest and quiet, to the unmolested enjoyment of which, as such, the plaintiffs are entitled, the character and extent as well of their rights as of the invasion of the same must be judged of in the light of that circumstance.

In the Court of Common Pleas of Berks County in Equity.
No. 1247 Equity Docket, 1919.

Application for injunction.

C. H. Ruhl and Edwin L. DeLong for plaintiff.

Joseph R. Dickinson and H. Robert Mays for defendants.

Opinion by Endlich and Wagner, JJ., August 6, 1919.—

This is an application for an injunction restraining the defendants, their agents, etc., from playing or causing to be played in a certain park in the city of Reading known as Lauer's Park, Sunday afternoon baseball games, to the annoyance and special nuisance of the plaintiffs, who are residents of the districts surrounding the park on three sides,—an almost entirely residential neighborhood,—and who are disturbed by the shoutings and other noises during the progress of the games; whose properties are trespassed upon by balls flying on to porches and into windows and by boys coming in to recover such balls; and who are liable to be hurt or injured by the balls.

According to the decision in Sparhawk vs. Ry Co., 54 Pa 401, the lawfulness or unlawfulness of the games under the Sunday Law is not in such a proceeding a decisive question. The ground of the application, and the only one we are at liberty now to consider, is that of interference with the personal and property rights of the plaintiffs. The significance of the fact that the games are played and the annoyances, etc., occur on Sundays is that, Sunday being a day of rest and quiet, to the unmolested enjoyment of which, as such, the plaintiffs are entitled, the character and extent as well of their rights as of the invasion of the same must be judged of in the light of that circumstance: See Com. vs. Coleman, 60 Pa. Super. Ct. 380, 382-3. No injunction has as yet been granted in this case. There has, however, been a hearing of testimony and argument thereon. The result of a careful review of what is

thus before us, and of the decisions settling the principles involved, leads to the clear conclusion that an injunction against playing the game of baseball on Sundays at the park referred to, with the incident and effect of special injury to the plaintiffs by disturbing noises, by the driving of balls upon plaintiffs' properties, and by the trespassing upon the same by persons seeking to recover the balls, cannot be denied under the authorities which are binding upon us,—such injunction to continue in force until final hearing and decree.

And now, Aug. 6, 1919, it is ordered that an injunction issue in the above-entitled case, to continue in force until final hearing and decree, restraining the defendants, their agents servants, employees, managers, players, lessees and associates, from playing or causing or permitting to be played any game or games of baseball at Lauer's Park, Reading, Pa., on Sundays, in such manner as to cause, or with the incident or effect of causing, shoutings or noises disturbing the rest or comfort of the plaintiffs within or upon their respective properties, and from driving balls or causing balls to fly upon said properties or any of them, and from causing or inducing or permitting persons to trespass upon the same for the purpose of recovering such balls.

RUNYEON vs. EACHES.

Evidence—Destruction of Evidence—Presumption—Admissibility.

1. The destruction of evidential documents not only raises a presumption that if produced they would militate against the party destroying them, but procures more ready admission to the evidence of the opposite side.

2. If books of account are destroyed by a partner, and an account is directed by a Court, every presumption will be made against the party to whose negligence or misconduct the non-production of proper accounts is due.

Practice—Findings of Referee—Weight of Such Findings—Proof.

3. The inference from the non-production of books and records of a corporation of which the plaintiff is an officer, and which would presumably authoritatively settle the question in dispute, necessarily makes against the plaintiff.

4. Where a referee's findings are based on direct or positive testimony of witnesses appearing before him, a degree of weight will attach to such findings which will not attach to such as are merely deductions from other facts found and therefore simply the products of reasoning.

5. The Court cannot find that to be a fact of which there is no proof.

In the Court of Common Pleas of Berks County, in Equity.

No. 1219 Equity Docket, 1918.

Exceptions to Referee's Report.

W. K. Stevens and John B. Stevens for defendant, exceptant.

H. J. Dumn for plaintiff.

Opinion by Endlich, P. J., August 11, 1919.—For about 30 years plaintiff and defendant were associated together as partners in the coal business, plaintiff being in a general way the financial manager, and defendant the "outside man." Dissensions having sprung up a few years ago between them, the partnership was dissolved by mutual consent, and eventually this suit was instituted, mainly to settle the rights of the respective parties upon distribution of the fund raised by the sale of the firm property. The trial and decision of the case were by counsel for the parties committed to a Referee, whose report is now before us. The controversy over it involves principally the question of plaintiff's liability to the firm for certain checks drawn by him to the order of his son upon the firm for amounts not owing by it but paid out of its funds, viz., a check of Dec. 6, 1902, for \$1,404.80, another of Jan. 31, 1903, for \$1,666.10, and still another of Dec. 9, 1902, for \$1,598, (for none of which checks, except the last in part, it is asserted on behalf of defendant, was the firm ever reimbursed),—and also for the sum of \$2,200, (borrowed on Sept. 20, 1902, by plaintiff from the firm and alleged not to have been repaid),—and finally, for \$3,000, (claimed by the defendant to be owing to the firm by the plaintiff as part of the proceeds, received but not accounted for by plaintiff, of the sale, in 1891, of certain real estate of the firm to the Reading Cold Storage and Ice Co.) On the first two of these items, the Referee in his report as originally made up found the facts in favor of the defendant's contention and charged the plaintiff accordingly. To that finding and conclusion, however, the plaintiff excepted before the Referee. At the instance of the plaintiff and with the consent of the defendant, the cause was reopened to let in further evidence. At the earlier hearings the plaintiff, supported by his son, denied the issuance and all recollection of any such checks as those of Dec. 6, 1902, and Jan. 31, 1903. But the fact that there were such was established with sufficient cogency to require it to be accepted as a fact, and there was nothing on which a finding of a return of the money to the firm could be predicated. At the hearings after the reopening of the case, the fact and amounts of the two checks were admitted on the part of the plaintiff, an explanation of them offered, and the reimbursement of the firm for the sums thus withdrawn from it asserted by the persons who before had denied all recollection of the checks. On the strength of this later testimony the Referee

changed his findings concerning the checks here spoken of and found that the amounts represented by them had been returned to the firm. Thereupon the defendant filed exceptions, the seventh and eighth of which attack this part of the Referee's report.

The great trouble about getting any decisive evidence bearing on the matters in dispute in this case results from the circumstance that, in defendant's absence, now about three years ago, the plaintiff caused to be destroyed the checks, stubs and books of the firm, which presumably would have settled every difficulty authoritatively, and that the pertinent records of certain other concerns with which the firm had dealings and in which plaintiff was interested, have also disappeared. It is not needful to believe, and the Referee declines to find, that the plaintiff caused the destruction of the firm's books, etc., with any sinister or unlawful motive. If he had so done it, the familiar rule *Omnia praesumuntur contra spoliatorem* would perhaps demand a decision against him. In *Best on Evidence*, sec. 412, it is, indeed, laid down that the destruction of evidential documents not only raises a presumption that if produced they would militate against the party destroying them, but procures more ready admission to the evidence of the opposite side. "If a man destroys a thing that is designed to be evidence against him, a small matter will supply it." And in *Lindley's Law of Partnership*, p. *405, it is said:

"If no books of account at all are kept, or if they are so kept as to be unintelligible, or if they are destroyed or wrongfully withheld, and an account is directed by a court, every presumption will be made against those to whose negligence or misconduct the non-production of proper accounts is due."

Nor can it be doubted that this doctrine finds ample support in cases adjudicated in this State: See *Frick v. Barbour*, 64 Pa. 120, and decisions following it. The adverse inference is one of fact and not of law: *Hall v. Vanderpool*, 156 Pa. 152, 155; *Ginder v. Bachman*, 8 Pa. Super. Ct. 405, 409. The inquiry whether it should have been made or not by the Referee is not beyond the province of the Court's review on exceptions to his report. It is well understood that where his findings are based on direct or positive testimony of witnesses appearing before him, a degree of weight will attach to such findings which will not attach to such as are merely deductions from other facts found and therefore simply the product of reasoning: See *Phillips's App.*, 68 Pa. 130, and similar cases. But apart from all this and its possible effect in the present case, it is clear that even though no improper purpose be imputed to the plaintiff, and no presumption made against him, yet the important circumstance of the absence

of the decisive proof has been created by him, who brought this suit and of course is bound to make out his case. As already indicated, his and his son's testimony at the first interrogation of them before the Referee and their deposition at the supplemental hearings are inconsistent on the subject of the checks of Dec. 6, 1902, and Jan. 31, 1903. There is no rule of law which for that reason categorically requires the rejection of the earlier or the later deposition, or both. See *Fulton v. Lancaster Co.*, 162 Pa. 294. But the party who first emphatically denied having given them or knowing anything about them can hardly expect to control the result by his subsequent testimony that he wrote the checks to the order of his son, that the money in each instance went as an emergency loan to a certain Hosiery Co. in which plaintiff was interested, to meet its pay-roll, and that in a few days it was returned to the firm,—especially where no imperative business reason for so roundabout a method as that pursued in these and other transactions is apparent, and there is nothing else to show positively that the exact amount withdrawn was repaid to the firm. It is, of course, not sufficient that there is no specific and express proof that the amount of these checks did not find its way back into the firm's hands. The failure of such proof does not warrant an assumption by the Court of the contrary: See *Reichner v. Trust Co.*, 236 Pa. 622, 626. The Court cannot find that to be a fact of which there is no proof: *ibid.*; *Keiser v. Real Estate Co.*, 43 Pa. Super. Ct. 130, 157. There is to be sure no requirement of proof to an absolute certainty: *Yoders v. Amwell Tp.*, 172 Pa. 447. Approximate certainty is enough: *ibid.* But obviously even for that purpose there must be competent legal proof. Now, a fair scrutiny of plaintiff's evidence shows that what he and his son deposed to at the supplemental hearings was not so much facts remembered by them as inferences, opinions, results of reasoning as to the facts, which they reached on a basis not disclosed but which they persuaded themselves and doubtless believed to represent the true situation. It is hardly necessary to say that, whether objected to or not, that is not the kind of testimony whereon to ground a finding in their favor. So far as these two checks are concerned, the record constrains us to accept the view first taken by the Referee rather than the second reversing himself, and accordingly to hold that the plaintiff is liable to make good to the firm the sums for which these checks are drawn.

And so with reference to the last item above mentioned, the subject of the third exception, to wit, the alleged unaccounted-for \$3,000 on the sale of the firm's real estate to the Cold Storage Co. The partnership had bought that lot not very long before, for \$7,000. The first statement of the plain-

tiff and his witness, the president of the Cold Storage Co., was that the latter paid \$7,000 for the lot. This was afterwards changed to \$7,500 alleged to have been paid in cash, but subsequently said to have been paid partly in stock of the Cold Storage Co.; and both statements as to the figures are contradicted by the deed of conveyance itself which, as drawn by the president of the Cold Storage Co., recites a consideration of \$10,000, (declared by him to have been "unthinkingly" written into the deed), and by the testimony of the defendant's daughter and son-in-law (denied on the other side) that in a conversation with them the president of the Cold Storage Co. stated that the consideration had been \$10,000 in cash,—defendant deposing to a like admission by plaintiff, which the latter in turn repudiated. Whatever profit there was on the sale, if any, there is no real proof of its receipt by the firm. There was a notice to the plaintiff from the defendant to produce the Cold Storage Co.'s books, papers, checks, etc., at the hearings before the Referee, which notice, however, was not complied with, although the plaintiff was an officer of the Cold Storage Co. It seems hardly credible that the Cold Storage Co. should have no books, records or memoranda which would throw light upon this question. The inference, therefore, from their non-production without explanation thereof would, in obedience to such cases as *Steininger vs. Hoch's Ex'r*, 42 Pa. 432; *Wills vs. Hardcastle*, 19 Pa. Super. Ct. 525; *Shannon vs. Gastner*, 21 id. 294, necessarily make against the plaintiff's contention and therefore call for a conclusion adverse to him on this point, holding him liable at least to the extent of \$2,500, the difference between \$7,500 and \$10,000, thus giving plaintiff the benefit of the doubt as between the greater and the lesser sum alleged on his side to have been paid by the purchaser and perhaps by implication to have been received by the firm.

On the other hand, when we come to the \$1,598 check, we find it conceded on all hands that this amount was withdrawn from the firm funds to pay taxes owing by the firm, by certain individuals, and by the Cold Storage Co., the latter to the amount of \$1,436. There is some of the same sort of testimony relative to this item as that above spoken of as incompetent and inconclusive and some of the same circuitousness of dealing; but the admitted circumstance that the rest of the amount went for the purposes indicated and that the debts thus incurred to the firm were satisfied, adds a degree of weight to the testimony that such was the case also with reference to the amount paid for the Cold Storage Co. Hence the Referee's findings to that effect ought not to be disturbed.

Much the same holds good as to the item of \$2,200. This was confessedly borrowed from the firm by the plaintiff. But

it was shown, by evidence which the Referee was entitled to accept as showing, that it was repaid in various smaller amounts. As already observed, absolute certainty is not necessary; approximate certainty is enough to sustain the finding of the Referee.

What has been said is believed to cover all the exceptions which call for discussion. The remaining matters seem to be adequately and properly disposed of by the treatment they received at the hands of the Referee.

The Exceptions III, VII and VIII will be sustained to the extent indicated in the foregoing opinion; the remaining exceptions will be dismissed; and counsel may prepare and submit the proper decree, sec. reg.

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1. Liens—Dyers' Lien—Act 20 May, 1913, P. L. 271.

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an arrangement with defendant making the property liable in defendant's hands to the latter's claims generally against O, and this without the assent or knowledge of the plaintiff, who was a stranger to the transactions between O and the defendant. **Held:** the affidavit is insufficient to prevent judgment. **CALTON MFG. CO. vs. PROSPECT DYE WKS.**, 8.

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Where one in the capacity of an heir unsuccessfully appeals to the Superior Court from the distribution ordered by the Orphans' Court, and the upper Court decrees that the costs of the appeal be paid out of the fund for distribution, the costs do not include the cost of the appellant's paper book, the premium on the bond or appellant's counsel fees.

Under the Act 15 April, 1907, P. L. 83, the party who loses the final decision is not entitled to charge and collect as part of the costs, the amount he expended for printing his paper book, for bond premium and for counsel fees. **DeTURCK'S EST.**, 115.

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All vested estates pass to a bankrupt's trustee, irrespective of whether the bankrupt's possession or enjoyment of the estate is postponed or not.

A testator gave to his widow a life estate in certain real estate and directed that upon her death it should be sold by his surviving executor and bequeathed the proceeds obtained from such sale to his three children, naming them, or their heirs in equal shares. Subsequent to testator's death and prior to his widow's demise, W., a son, was adjudicated a bankrupt. His trustee filed a petition praying for an order upon W., surviving executor, directing him to comply with the provisions of the will of the testator by forthwith selling the real estate. **Held:** that the remainder given to W. vested in him at the death of the testator subject to the life estate in favor of the widow, and as such passed to his trustee in bankruptcy. **BOBST'S EST.**, 135.

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The drawer of a check has the right to stop payment any time prior to its date and actual payment. SECOND NAT'L BANK vs. ZABLE, 27.

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A bank holding stock as collateral security for a promissory note is bound to preserve it and apply it for the benefit of the assignor, and is liable to the assignor for any loss incurred by its misuse. HAMMEKE vs. READING NAT'L BANK, 226.

3. **Notes—Fraud on Maker.**

Where a note is obtained from a maker under certain representations or agreements as to the use to be made of it, and is put into circulation in fraud of these representations, the holder of the note, to recover upon it, must show a purchase for value before maturity without notice of fraud. MASSEY, to use, etc., vs. GEISLER et al., 154.

4. **Promissory Notes—Note under Seal—Consideration.**

Want of consideration is no defence to a note under seal unless fraud is alleged in its execution. WERNER'S EST., 140.

CONFLICT OF LAWS.

1. **Domicile of Testator—Situs of Property Disposed of by Will.** ALEXANDER'S EST., 93.

CONSTITUTIONAL LAW.

1. **Public Officers—Increase of Salary During Term—Section 13, Art. III of the Constitution.** SHIRK vs. DIRECTORS OF POOR, 150.

CONTRACTS.

1. **Consideration.**

Testator during his lifetime leased a tract of land in 1908 for a term of 5 years and gave the lessees the right to purchase the demised premises for a stipulated sum within one year from the date of the lease. The term was extended from time to time until 1916, when the lessor again renewed the lease by endorsing on it, "The lease is extended for two years to Dec. 2, 1918, and also the right to purchase extended to same date." The lessee continued in possession, paying the same rental as fixed in the lease originally and made further improvements on the premises. The lessor hav-

ing died on January 17, 1917, the lessees appeared in the Orphans' Court asking for a decree of specific performance averring a tender of the stipulated consideration to and its refusal by the executors of the lessor. The executors by demurrer resisted the decree on the ground that the extension of the lease and the right to purchase were given without consideration. **Held:** that the renewal of the lease and the agreement of the lessees to pay a certain rent constituted a sufficient consideration for the renewal of the right to purchase, and demurrer overruled. **OWEN'S EST.**, 86.

2. Heating Plant—Evidence—Weight of Evidence—New Trial.

In an action of assumpsit for labor and material furnished in installing a heating plant in the house of the defendant, a verdict for the plaintiff will be set aside as against the weight of the evidence, where a fair consideration of the evidence impels the conclusion that the plant was of no use and unsatisfactory to the defendant and that the plaintiff had agreed that he would remove the system if it proved unsatisfactory to the defendant. **FEGLEY vs. ROTHERMEL**, 28.

3. Implied Contracts—Support and Maintenance of Weak-Minded Person. **KELLER vs. COMMERCIAL TRUST CO., GUARDIAN**, 127.

4. Interpretation.

Courts will, if they can, give to the contracts of the parties the exact effect which the parties themselves gave to them, and interpret them just as they interpreted them. **OWEN'S EST.**, 86.

5. Real Estate Brokers—Act 27 May, 1841, P. L. 396—Act 10 April, 1849, Sec. 18, P. L. 573—License—Validity of Claim for Compensation—Question for Jury—New Trial.

Where one pursues the business of a real estate broker, it is (under the Act 27 May, 1841, P. L. 396, as supplemented by the Act 10 April, 1849, Sec. 18, P. L. 573), a condition precedent to the lawfulness of his transactions and the validity of his claim for compensation, whether under a special contract or not, that he shall have paid for and secured a license as a real estate broker. But whether a plaintiff claiming compensation for selling real estate under a special contract is a real estate broker is not a question of law to be decided by the Court, but one of fact for the jury upon the evidence. **ULLMAN vs. HANTSCH**, 182.

6. Sale and Purchase—Waiver of Stipulation—Question for Jury.

The requirement in the draft of a contract of sale and purchase that the contract must be signed by an officer or branch manager of the vendor company before becoming a contract binding on the company, being inserted for the protection or benefit of the vendor, may be waived, and the question of waiver is ordinarily one for the jury, being for the Court only where the facts are indisputable and the inference from them one of law. **HODGES vs. FOSS-HUGHES CO.**, 19.

CORPORATIONS.

1. Right of Director to Contract with Corporation.

A director is not debarred, by reason of his office, from entering into a contract with the corporation, but the contract is subject to the principle that where he appears on both sides of it, it will be closely scrutinized in equity, and set aside unless made in that

entire good faith which the law demands of this species of fiduciary. **REAL ESTATE TITLE INSURANCE & TRUST CO. et al. vs. ALLENTOWN & READING TRACTION CO. et al.**, 189.

2. Rights and Duties of Officers. COM. vs. FRANKEL, 147.

CRIMINAL LAW.

1. Arson—Circumstantial Evidence—Doubt of Guilt—New Trial.

After conviction on an indictment for arson, a new trial will be granted where the evidence was largely circumstantial and left doubt as to the defendant's guilt. **COM. vs. SEIDEL, 105.**

2. Assault and Battery—Corporations—Right and Duties of Officers and Directors.

The vice-president and director of a corporation, beyond the power to inspect the books and records of the company, has the right to go to any portion of the plant for the purpose of overseeing the management, and a manager who forcibly ejects him from the premises of the corporation while acting in such capacity is guilty of assault and battery. **COM. vs. FRANKEL, 147.**

3. Embezzlement—Unincorporated Beneficial Association—Embezzlement of Funds Acquired by Illegal Practices—Evidence.

The treasurer of an unincorporated beneficial association who receives and wilfully appropriates its funds to his own use is guilty of embezzlement even though he is a member of the association. In such a case the defendant cannot be heard to say that the association acquired some of the embezzled funds from illegal practices. **COM. vs. EISENBISE, 124.**

4. Fornication and Bastardy—New Trial.

After conviction on the charge of fornication and bastardy, a new trial will be granted where the verdict is palpably contrary to the evidence and the weight of the evidence, and unjust to the defendant. **COM. vs. WEIMERT, 55.**

5. Gambling—Lotteries—Criminal Code, sec. 55.

COM. vs. FREEDMAN, 184.

6. Newly Discovered Evidence—New Trial—Practice, Q. S.

In the consideration of a motion for a new trial on the ground of newly discovered evidence, the Court will make the rule absolute where the legitimate effect of such evidence, if believed by the jury, would require a different verdict. On such a motion the question is (supposing all the testimony, new and old, before another jury), not whether they might, but whether they ought to give a different verdict. **COM. vs. MITCHELL, 49.**

DECEDENTS' ESTATES.

1. Claim for Nursing and Boarding.

Where a claim is made by a son-in-law, against the estate of his mother-in-law, for nursing and boarding decedent, without proof of a contract to pay for same, and it appears that other sons of the decedent had nursed and boarded her without charge for equal periods of time, the presumption is strongly against the existence of any such relation as will justify the inference of an implied contract. **BOLIG'S EST., 5.**

2. Devise Subject to Mortgage—Intention of Testator.

Where a father assumed an indebtedness of his son and then secured it by a mortgage on property which the father subsequently devised to the said son and a daughter, and there was nothing in the will showing the testator's intention to exonerate the devised real estate from the mortgage, the devisees take the property subject to the mortgage. KLEMMER'S EST., 113.

3. Direction to Pay a Specific Debt—Devises.

Where a decedent gives his whole estate to his wife, and also directs, "the amount owed by me to my mother, Emma R. Boyd, must first be paid, if any of the said amount remains unpaid at the time of my death," the language is not definite enough to inform the devisee what amount she would have to pay, if she would accept the devise. Under these circumstances, the mere fact that considerable time elapsed before the election was made, does not prevent or estop the widow from electing to take against the will.

One is not bound to elect until he is fully informed of the relative value of the things he is to choose between; and if he makes an election before the circumstances necessary to a judicious and discriminating choice are ascertained, he will not be bound. BOYD'S EST., 1.

4. Jurisdiction of O. C.—Enforcement of Decedent's Contract.

OWEN'S EST., 86.

5. Liability of Husband for Medical Attendance to Wife.

A husband is primarily liable for the medical attendance and other expenses incident to his wife's illness and death although she has a separate estate. WERNER'S EST., 140.

6. Property Outside the Estate—Jurisdiction. HARTGEN vs.

HARTGEN, Adm., 63.

7. Residue Defined. KLEMMER'S EST., 76.

8. Testamentary Guardian—Practice, O. C.

When a testator directs his trustees to perform duties with relation to his minor child that correspond to the duties of a guardian of the person and estate of such minor, the trustees will be considered as testamentary guardians, and no other guardian will be appointed. TRAGLE'S EST., 187.

9. What Constitutes Testamentary Capacity.

A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in; the full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the recipients of his bounty. BURBECK'S EST., 31.

10. Widow's Election to Take Against the Will—Act 21, April 1911, P. L. 79.

The mere fact that there may have been undue delay by a widow in electing to take against her husband's will does not forfeit the right. Where the settlement of an estate has not been delayed or interfered with, and no intervening rights, which may have accrued, will be disturbed, and no injury will result to the parties interested in the estate, mere lapse of time will not deprive the widow of her right to election. BOYD'S EST., 1.

11. Wills—Testamentary Capacity—Issue Devisavit vel non—Evidence.

In deciding the question whether such a substantial dispute as to the testamentary capacity of the testator has arisen as to warrant a submission of it to a jury, the Court sits as a chancellor and must consider the entire evidence. In such a case the question is not whether some of the testimony, standing alone, would justify a verdict, but whether it would, considered as a whole. *BECHTEL'S EST.*, 175.

DIVORCE.

1. Alimony Pendente Lite—Counsel Fees—Practice, C. P.

Whilst the right to an allowance of alimony pendente lite and counsel fees is not an absolute one, but rests in the sound discretion of the Court, it is the uniform practice in Pennsylvania to make such allowances according to the circumstances of the parties whether the wife be the libellant or respondent.

Ordinarily on an application for alimony pendente lite the merits of the case will not be inquired into, but where there is conclusive proof of the wife's adultery or her commission of some such grave offence, or of a state of facts which would preclude the possibility of a decree of divorce in favor of the wife petitioning, alimony will be refused, though it seems that counsel fees are still to be allowed. *SIEGFRIED vs. SIEGFRIED*, 57.

EQUITY.

1. Bill in Equity—Answer—Pleading—Act 28 May, 1913, P. L. 358.

A bill in equity praying for an accounting and the appointment of a receiver should be a simple statement of the facts upon which plaintiff's prayers are based, in order that the defendants may be duly apprised of the essential inquiry and be enabled to collect testimony to meet it.

In a bill in equity every fact essential to the right to the relief prayed for must be averred. Neither unproved allegations nor proof of matters not alleged can be made a basis for equitable relief.

Where the answer to a bill in equity is responsive the burden of establishing his case by competent proof is cast upon the plaintiff.

The Act 28 May, 1913, P. L. 358, abolishing the rule as to the evidence necessary to overcome a responsive answer does not apply to actions instituted prior to the passage of the act. *REAL ESTATE TITLE INS. & TRUST CO. et al. vs. ALLENTOWN & READING TRACTION CO. et al.*, 189.

2. Injunctions—Sunday Baseball.

HORN et al. vs. READING BASEBALL, etc., ASS'N. et al., 239.

EVIDENCE.

1. Assumpsit—Conflict Between Oral and Written Evidence—Question for Jury.

The finding of a jury that money paid by a decedent to his daughter was a loan and not a gift will not be set aside where the oral evidence submitted is contradictory, and such oral evidence is sufficient to overcome a written statement declaring the payment to be a gift alleged to have been signed by the decedent, the authenticity of which appears on its face to be doubtful. *SCHWEYER, Exec., vs. HIGH*, 166.

2. Destruction of Evidence—Presumption—Admissibility.

The destruction of evidential documents not only raises a presumption that if produced they would militate against the party destroying them, but procures more ready admission to the evidence of the opposite side.

If books of account are destroyed by a partner, and an account is directed by a Court, every presumption will be made against the party to whose negligence or misconduct the non-production of proper accounts is due. *RUNYEON vs. EACHES*, 240.

3. Fraud—Weight of Evidence—New Trial.

HALTZELL vs. PRINTZ et al., 133.

4. Newly Discovered Evidence—New Trial.

COM. vs. MITCHELL, 49.

5. Testimony of Accomplice—Corroboration.

COM. vs. STEIN, 101.

FEES.**1. Counsel Fees—Divorce.**

SIEGFRIED vs. SIEGFRIED, 57.

2. Orphans' Court—Practice—Counsel Fees.

Where counsel were largely responsible for surcharging the executors of an estate for approximately \$48,000, a counsel fee of \$2,000 is reasonable and will be allowed under the equitable principle, that having been responsible for the production of the fund, counsel are entitled to be paid out of it.

In an account of an ancillary administrator, where the settlement of the estate aggregated \$75,000 and covered a period of about seven years; where the time and labor involved were above the ordinary legal services incident to the settlement of the estate; where it appeared that important litigation was pressed to a successful conclusion and realized a fund of more than \$30,000 for payment to creditors; where part of the fees charged depended for payment largely upon the successful outcome of the litigation; and where the uncontradicted testimony of leading members of the Bar upheld the fairness of the charge, an exception to a counsel fee of \$9,000 will be dismissed. *MIDDLEBY'S EST.*, 118.

FRAUD.**1. Evidence—Weight of Evidence—New Trial.**

Where the issue is fraud and plaintiff's oral evidence in support thereof is contradicted by all the other evidence and by all the fair deductions therefrom and by plaintiff's own evidence at a former trial, a new trial will be granted. *HALTZELL vs. PRINTZ et al.*, 133.

GARBAGE.

1. Titles of the Third Class—Power to Regulate Removal of Garbage. *SERENCSE vs. FILBERT et al.*, 231.

GIFTS. (See also Wills).**1. Gift Inter Vivos.**

To constitute a gift inter vivos two essential elements must combine; an intention to make the gift then and there, and such an actual or constructive delivery at the same time to the donee as invests the donee therewith. *STRAUSE'S EST.*, 235.

GUARDIANS.**1. Testamentary Guardians. TRAGLE'S EST., 187.****2. Weak-Minded Persons—Act 28 April, 1907, P. L. 292—Act 13 June, 1836, P. L. 597—Support and Maintenance—Implied Contract—Necessity of Support.**

The guardian of a weak-minded person has, by virtue of section 6 of the Act 28 April, 1907, P. L. 292, the same powers and duties as a committee on lunacy.

Sections 20 and 21 of the Act 13 June, 1836, P. L. 597, make it the duty of the guardian of a weak-minded person to apply the income of such person's estate towards his support and maintenance, and if the income is not sufficient, to petition the Court for leave to apply so much of the principal as is necessary.

Where a person furnishing board to a weak-minded person notifies the legal guardian of such person to remove its ward or pay board for the ward, and the guardian fails to take him away, such failure constitutes an implied contract that the guardian will pay for the ward's support and maintenance.

In the absence of a contract, express or implied, the extreme necessity for providing for the wants of a weak-minded person may, under special circumstances, entitle one who voluntarily cares for such person to payment out of his estate. *KELLER vs. COMMERCIAL TRUST CO., Guardian*, 127.

INJUNCTIONS.**1. Mandatory Injunctions—Practice. DEELMAN vs. SHERMAN et al., 38.****2. Sunday Baseball—Sunday Law.**

An injunction restraining defendants from playing baseball games on Sunday afternoons to the annoyance and special nuisance of the plaintiffs, residents of the district surrounding the baseball park on three sides, will be granted where the evidence shows special injury to the plaintiffs by disturbing noises, by the driving of balls upon plaintiffs' properties, and by trespassing upon the same by persons seeking to recover the balls.

The lawfulness or unlawfulness of the games under the Sunday law is not a decisive question in such a proceeding. The significance of the fact that the games are played and the annoyances occur on Sundays is that, Sunday being a day of rest and quiet, to the unmolested enjoyment of which, as such, the plaintiffs are entitled, the character and extent as well of their rights as of the invasion of the same must be judged of in the light of that circumstance. *HORN et al. vs. READING BASEBALL, etc., ASS'N. et al.*, 239.

INSOLVENCY. (See Receivers).**INSURANCE.****1. Storm Insurance—Pro-Rating Loss.**

Where an insurance policy covering loss by fire, storm and lightning provides that the company shall not be liable for a greater proportion of any loss on the property than the amount thereby insured bears to the whole insurance, and the property is destroyed by storm, the loss will be pro rated among companies whose policies insured the property against storm, but not among those insuring it against loss by fire alone. *ANGELICA WATER & ICE CO. vs. FARMERS' MUTUAL FIRE INS. CO.*, 108.

JOINT TENANCY.**1. Survivorship—Act 3 March, 1812, 5 Sm. L. 395.**

While the right of survivorship as an incident of joint tenancy at common law has been established by the Act 31 March, 1812, 5 Sm. L. 395, it is not forbidden by the Act, nor made illegal in any way to create by grant or devise an estate with the same attribute of survivorship as joint tenancy at common law; and survivorship as an incident of an estate granted being still lawful, its creation becomes a question of intent.

Where A withdrew money from bank and redeposited it in the name of herself or B, her daughter, intending to create a joint tenancy, and that the survivor should take the fund, and A died, the title vested immediately and absolutely in B, who survived. *STRAUSE'S EST.*, 235.

JUDGMENTS.**1. Rule to Open—Lien on Subsequent Indebtedness—Affect on Innocent Third Party.**

Whilst as between the original parties a judgment confessed by the one to the other may by their agreement be made to stand for subsequently arising indebtedness, this cannot be done to the prejudice of innocent third parties. *HECKMAN vs. HECKMAN*, 6.

2. Rule to Open—Practice, C. P.

MASSEY, to use, etc. vs. *GEISLER et al.*, 154.

3. Rule to Open—Question for Jury.

Whether or not there has been an agreement by which a third party could be affected, and whether or not the indebtedness represented by the confessed judgment arose from transactions or advances which the judgment was originally intended to stand for are questions for the jury. *HECKMAN vs. HECKMAN*, 6.

JURISDICTION, C. P.**1. Decedents' Estate — Jurisdiction — Property Outside the Estate.**

The Court of Common Pleas, either by action at law or in equity, and not the Orphans' Court, has jurisdiction where an heir at law attempts to recover for the estate a sum of money clearly outside of the estate. *HARTGEN vs. HARTGEN*, Adm., 63.

JURISDICTION, EQUITY.**1. Heir-at-law's Right to Sue in Equity.**

HARTGEN vs. HARTGEN, Adm., 63.

JURISDICTION, O. C.**1. Enforcement of Decedent's Contract—Act 24 February 1834, P. L. 70—Act 28 April 1899, P. L. 157—Orphans' Court Act of 1917.**

The Act 24 February 1834, P. L. 70, granting to the Orphans' Court jurisdiction to enforce contracts for the sale of real estate where the vendor died seized or possessed without having made provision for the performance of the contract was superseded by the Act 28 April 1899, P. L. 157, enlarging the scope of the Act of 1834, and the Orphans' Court Act of 1917 does not change the law in this respect. *OWEN'S EST.*, 86.

LANDLORD AND TENANT.**1. Execution—Rent—Priority of Rent.**

Under the Act 16 June 1836, P. L. 777, Sec. 83, a landlord is entitled to a preference for rent due at the time of the levy. *AUGE vs. SCHWOYER*, 110.

LIENS.**1. Dyers' Lien—Act 20 May 1913, P. L. 271.**

The Act 20 May 1913, P. L. 271, in giving dyers a lien for pending accounts seems to have reference to accounts between them and the owner, and to apply only where work, labor or materials were furnished by the dyers in the treatment of the goods for the owners. *CALTON MFG. CO. vs. PROSPECT DYE WORKS*, 8.

2. Municipal Liens—Sewers—Loss of Claim—Act 20 June 1911, P. L. 1076, Sec. 1. *READING vs. MOERS*, 229.

3. Sewer Liens—Act 30 March 1903, P. L. 115, Sec. 5. *READING vs. SHENK*, 18.

MANDAMUS.

1. Cities of the Third Class—Right to Remove Garbage—Permits. *SERENCSE vs. FILBERT et al.*, 231.

MUNICIPAL LAW.

1. Cities of the Third Class—Liens—Sewers—Sewers Laid on Private Property—Act 30 March 1903, P. L. 115, Sec. 5.

Under Sec. 5 of the Act 30 March 1903, P. L. 115, a city of the third class has the right to construct a sewer along an alley which was never by the city legally laid out, taken over or opened as a public thoroughfare and charge the cost on the abutting property. *READING vs. SHENK*, 18.

2. Cities of the Third Class—Power to Regulate Collection of Garbage—Exclusive Right to Remove—Act 27 June 1913, P. L. 277, Art. V, Secs. 39 and 49.

A city of the third class can lawfully put the business of collecting and removing the garbage within the city limits into the hands of a contractor and decline to license any other party.

Cities of the third class, by virtue of Sec. 39 of Art. V of the Act 27 June 1913, authorizing cities "to make regulations to secure the general health of the inhabitants and to remove and prevent nuisances," as well as by virtue of Sec. 49 of Art. V of the same act authorizing the Council "to make all such ordinances, by-laws, rules and regulations not inconsistent with the Constitution and Laws of this Commonwealth as may be expedient or necessary for the maintenance of the peace, good government, safety and welfare of the city," are empowered to ordain regulations for the collection and removal of garbage.

Without the right to grant exclusive right to collect and remove garbage, a municipality's power to regulate and deal with it would be imperfect and futile.

The existence of the power of a city to regulate the collection and removal of garbage does not hinge on whether or not the collection and removal of garbage is a nuisance.

In no constitutional sense does the granting by a city of an exclusive right to collect and remove garbage involve the taking of property for public use without adequate compensation, or constitute a restraint upon trade.

A party affected by a city's exercise of its power to grant an exclusive right to collect and remove garbage cannot escape from it by showing that he, in respect to garbage collected by him, is under contract obligation to the owners of the garbage, or that he is conforming to the means, methods, etc., prescribed by the city's ordinance or contract.

A city, in the exercise of its power to regulate the collection and removal of garbage, has a discretion not controllable by the Court, the question being not one of law but of practical expediency.

A municipality's possession of the power to regulate the collection and removal of garbage implies a duty to exercise it, if expedient or necessary or advantageous to the public, whereof the municipal authorities are the judges. *SERENCSE vs. FILBERT et al.*, 231.

3. Liens—Sewers—Loss of Claim—Act 20 June, 1911, P. L. 1076, Sec. 1.

Under the Act 20 June, 1911, P. L. 1076, Sec. 1, providing for the enforcement of municipal liens, a claim will be wholly lost if not revived by scire facias within five years following the date on which a writ of scire facias was issued thereon. *READING vs. MOERS*, 229.

NEGLIGENCE.

1. Contributory Negligence—Action in the Presence of Imminent Danger.

A plaintiff cannot be considered guilty of contributory negligence when, through no fault of his own, he is placed in a position imminently dangerous to his immediate safety, even though his actions may not have been guided by the good judgment which under ordinary circumstances would have been necessary. *LEBO vs. READING TRANSIT & LIGHT CO.*, 51.

2. Contributory Negligence—Automobile Truck—Question for the Jury.

On the trial of an action for damages for personal injuries resulting from the alleged negligence of the defendant's employee in driving an automobile truck, a verdict for the plaintiff will be sustained where the plaintiff adduced evidence that the truck was driven around a corner down a crowded street without sounding the horn; that the driver paid no attention to signals and shouts to stop, and that instead of looking ahead he kept looking backwards and thus ran into the plaintiff, and the defendant's witnesses testified that the plaintiff stepped backwards right in the way of the truck without looking in the direction in which he was stopping.

The existence of contributory negligence on the part of a plaintiff can be declared by the Court as a matter of law only in clear cases. Where the testimony is conflicting or susceptible of different inferences, it is for the jury. *GOTTSCALL vs. WELLER*, 21.

3. Declarations of Employee—Res gestae.

Statements and declarations made by defendant's employee immediately after an accident which relate directly to the occurrence and which are essentially connected therewith are admissible as part of the *res gestae* provided that they are statements of fact and not of mere opinion. *LEBO vs. READING TRANSIT & LIGHT CO.*, 51.

4. Master and Servant—Defective Appliances—Stepladder—Inspection—Case for Jury.

The duty of the employer to furnish his servants with reasonably safe tools and appliances with which to work is an absolute

one from which nothing but performance will relieve the employer.

The continuing and bounden duty of the employer is not only to furnish a reasonably safe place for his servants to work and reasonably safe machinery and appliances, but also to use reasonable care to keep such place and such instrumentalities in a reasonably safe condition, and this is to be accomplished only by a proper and timely inspection so as to ascertain defects, if any, and repair them.

In an action to recover damages for personal injuries sustained by a house-cleaner resulting from a fall from a stepladder upon which she was working while in defendant's employ, the case is for the jury and a verdict for the plaintiff will be sustained where the ladder given to the plaintiff by defendant to use was thirteen years old; that three or four years prior to the accident the brace that held the ladder together broke and was replaced by a piece of rope with defendant's knowledge; and that while the plaintiff was using the ladder the rope broke because of its rotten condition, causing the ladder to collapse and the plaintiff to fall. *MACHAMER vs. DAVIS*, 168.

5. Steam Road Roller—Sparks—Fires—Circumstantial Evidence.

In an action for damages for property destroyed by a fire alleged to have been caused by the negligent operation of a steam road roller, the case is for the jury and a verdict for the plaintiff will be sustained where the evidence shows that the road roller was in close proximity to the property destroyed, that the wind was blowing directly towards it, that the roller had no spark arrester, that from 15 to 30 minutes before the fire was discovered the roller started up a hill close by the property, and that there was no other source of explaining the origin of the fire. *RANK vs. TOWNSHIP OF ROBESON*, 11.

6. Townships — Road — Bridge — Automobiles—Contributory Negligence.

In an action for damages to an automobile it appeared that the plaintiff while driving his car along a country road in broad daylight turned off the beaten part of the road onto grass and weeds along the side causing the hind wheels to skid just as the car approached a bridge without guard rails. The automobile fell over the side of the bridge into a creek below. The Court granted a non-suit on the ground of contributory negligence, holding that even if the township was negligent in allowing grass to remain on the road, it could have been seen and avoided by the plaintiff, and that the absence of a guard rail on the bridge was such a conspicuous danger that a reasonable use of eyesight would have avoided it. *MERTZ vs. GREENWICH TWP.*, 91.

NEGOTIABLE INSTRUMENTS. (See Bills & Notes).

PLEADING.

Bill in Equity—Answer—Act 28 May, 1913. P. L. 358.

REAL ESTATE TITLE INS. & TRUST CO. et al. vs ALLEN-TOWN AND READING TRACTION CO. et al., 189.

PRACTICE, C. P.

1. Affidavit of Defence, Common Carriers—Injury to Property in Transit—Act of God—Discretion as to Supplemental Affidavit.

Plaintiff's statement averred that the defendant, a common carrier, accepted for transportation a quantity of potatoes in good condition and upon a through bill of lading which negated the

defendant's liability for injury caused "by the act of God." While in transit the potatoes were ruined by freezing. The defendants in its affidavit of defence, after broadly denying negligence and setting up some general allegations designed to account for the delay in transportation, contended that the freezing was an act of God, for which it was not liable either at common law or on bill of lading, without disclosing facts showing that it was free from blame. **Held:** that the affidavit was insufficient to prevent judgment.

Where an affidavit of defence is defective, the Court may at its discretion permit the filing of a supplemental affidavit. **DREIBELBIS & CO. vs. PHILA. & READING RY. CO., 60.**

2. Decrees—Statutory Proceedings—Presumption.

BROWN vs. WERTZ & CO., 151.

3. Divorce—Alimony Pendente Lite.

SIEGFRIED vs. SIEGFRIED, 57.

4. Error in Amount of Verdict—Remittitur.

An obvious error in the amount of a verdict will be remedied by ordering a remittitur. **FIDLER vs. FIDLER, 171.**

5. Excessive Verdict—New Trial.

Where the jury's verdict in an action for damages for personal injuries due to the alleged negligence of the defendant is for a sum that is beyond what is usual and needful for the purposes of compensation for the plaintiff's suffering and pecuniary loss, past, present and future, the Court will order a new trial. **LEBO vs. READING TRANSIT & LIGHT CO., 51.**

6. Findings of Referee—Weight of Such Findings—Proof.

The inference from the non-production of books and records of a corporation of which the plaintiff is an officer, and which would presumably authoritatively settle the question in dispute, necessarily makes against the plaintiff.

Where a referee's findings are based on direct or positive testimony of witnesses appearing before him, a degree of weight will attach to such findings which will not attach to such as are merely deductions from other facts found and therefore simply the products of reasoning.

The Court cannot find that to be a fact of which there is no proof. **RUNYEON vs. EACHES, 240.**

7. Fraud—Weight of Evidence—New Trial. HALTZELL vs. PRINTZ et al., 133.

8. Judgments—Rule to Open. 4

On a petition to open a judgment the Court sitting as a chancellor must decide the question of the weight of the evidence. If it is in doubt upon this question, or as to the credibility of witnesses, a provident course would suggest the aid of a jury. If the testimony taken on the rule would be sufficient to justify the submission of the question to a jury, the Court may, in its discretion, make an order to open; but if on the testimony so taken the Court would set aside a verdict for the defendant, the Court should refuse to open. **MASSEY, to use, etc., vs. GEISLER et al., 154.**

9. New Trial—Contradictory Evidence—Question for Jury.

A new trial will be refused where the evidence, although contradictory, is sufficient to support the verdict. **FIDLER vs. FIDLER, 171.**

10. Province of Court and Jury.

The Court is always careful to avoid interference with the province of the only tribunal our legal system has provided for the trial of disputed facts, when their action can be attributed to the influence of legal testimony, even by a strained intendment, but where no intendment can sustain a verdict rendered, it must be set aside. *BUCK et al. vs. ZIEMER*, 16.

11. Question for Jury—New Trial. *ULLMAN vs. HANTSCH*, 182.

12. Trespass—Appeal from Alderman's Judgment—Affidavit of Defence Raising Question of Law.

In an action of trespass brought into the Common Pleas on appeal from the judgment of an alderman, judgment will be entered for the defendant on an affidavit of defence raising a question of law where the transcript clearly shows that the action was based on the defendant's negligent driving of an automobile. *STRASSER vs. SEAMAN*, 23.

13. Verdict—Form of Verdict.

Where the verdict actually rendered by the jury accords with the form prepared by it in the jury room it will be sustained. *BORKEY vs. FAUST*, 25.

14. Verdict Based on Guess or Compromise.

Where in the light of the evidence the jury's verdict appears to be a guess or a compromise, it will be set aside and a new trial granted. *BUCK et al. vs. ZIEMER*, 16.

15. Weight of Evidence—New Trial. *FEGLEY vs. ROTHERMEL*, 28.

16. Workmen's Compensation—Appeal—Finding of Fact. *KOCH vs. PHILA. & READING RY. CO.*, 58.

17. Workmen's Compensation—Appeal from Referee's Decision. *SAMET vs. IMBER BROS.*, 165.

18. Workmen's Compensation—Practice on Appeal. *BERKS COUNTY TRUST CO. vs. READING PAPER MILLS*, 156.

PRACTICE, EQUITY.

1. Mandatory Injunctions. *DEELMAN vs. SHERMAN et al.*, 38.

2. Requests.

It is the duty of a chancellor to find all material disputed facts, but not what the proofs were in regard thereto either one way or the other.

A chancellor cannot be expected to check up the work of court stenographers for the purpose of determining whether they correctly transcribed the evidence.

A chancellor will refuse a request to state as a finding of fact the evidence and occurrences of the trial.

Argumentative requests for findings of fact will be refused by a chancellor.

A chancellor will refuse to make a finding of fact based on evidence which is not relevant or material to any issue raised by plaintiff's bill. *REAL ESTATE TITLE INS. & TRUST CO. et al. vs. ALLENTOWN & READING TRACTION CO. et al.*, 189.

PRACTICE, O. C.

1. Counsel Fees. MIDDLEBY'S EST., 118.
2. Testamentary Guardians. TRAGLE'S EST., 187.

PRACTICE, Q. S.

1. Criminal Law—Evidence—Testimony of Accomplice—Corroboration—Instruction to Jury—Reasonable Doubt.

While it is a well established rule that it is the duty of the Court to admonish the jury of the danger of convicting upon the uncorroborated testimony of an accomplice, this rule does not require the Court to so advise the jury where the testimony of the accomplice is corroborated on material points.

Failure to explain to the jury the expression "reasonable doubt" and to charge in the language of the law and stop at that, is not reversible error. COM. vs. STEIN, 101.

2. Newly Discovered Evidence—New Trial. COM. vs. MITCHELL, 49.

3. Nol. Pros.—Re-Indictment.

A nol. pros. does not operate as an acquittal nor stand in the way of a re-indictment. COM. vs. EISENBISE, 124.

PUBLIC OFFICERS.

1. Poor Directors—Increase of Salary During Term—Act 24 May, 1917, P. L. 293—Section 13, Art. III. of the Constitution.

Whether an officer is a "public officer" within the intendment of the constitutional prohibition depends upon the manner of his selection, the duties imposed and the powers conferred upon him. If he is chosen by the electorate for a definite and certain tenure in the manner provided by law to an office whose duties affect and are to be exercised for the benefit of the public for a stipulated compensation paid out of the public treasury, the incumbent is a public officer within the meaning of the constitutional provision.

A poor director in Berks county, elected in November, 1913, subject to the Act 3 May, 1909, P. L. 382, is a public officer within the meaning of Section 13, Art. III of the Constitution, and is thereby deprived of the right to receive an increase of salary under the Act 24 May, 1917, P. L. 293. SHIRK vs. DIRECTORS OF POOR, 150.

REAL PROPERTY.

1. Covenants—Building Restrictions—Porches — Equity — Injunction.

In construing covenants or restrictions as to the use of property the circumstances and conditions surrounding the parties and property must be considered as well as the manifest objects of the grant or restriction. The intent of the parties and the object of the deed or restriction should govern, giving the instrument a just and fair interpretation.

In the construction of building restrictions, all doubts are to be resolved against the restriction, and in favor of the free and unrestricted use of the property.

Where a deed conveying a lot of ground contains the restriction that any building thereon erected must be built not less than twenty feet south of the building line of a street, and the purchaser builds a house entirely south of the twenty-foot restriction and attaches a porch to the house extending beyond the twenty-foot restriction, the Court will not award a mandatory injunction to compel the removal of the porch.

The jurisdiction for a mandatory injunction will not be exercised except in the clearest cases. **DEELMAN vs. SHERMAN et al.**, 38.

2. Misdescription of Real Estate. CLAPPIER vs. FISHER, 131.

RECEIVERS.

1. Equity—Appointment of Receivers—Insolvency.

A chancellor will not appoint a receiver as a punishment for past dereliction, nor because of past dangers. Receivers are appointed because of present conditions, and well-founded apprehension of the future.

The appointment of a receiver does not necessarily follow upon the insolvency of a corporation and will not be made unless it is shown that loss will ensue to the parties in interest if the persons or officers in the present control and management of the affairs are not superseded. **REAL ESTATE TITLE INS. & TRUST CO. et al. vs. ALLENTOWN & READING TRACTION CO. et al.**, 189.

RES ADJUDICATA.

1. Construction of Rule.

The rule that a cause of action once finally determined without appeal, between the parties, on its merits, by any competent tribunal, cannot afterwards be litigated by new proceedings either before the same or any other tribunal, requires that the cause of action be determined on the merits by a competent tribunal and between the same parties, and that the tribunal had authority to pass on the question at the first adjudication. **WERNER'S EST.**, 140.

RES GESTAE. (See Negligence).

SALES.

1. Waiver of Stipulation—Contracts.

HODGES vs. FOSS-HUGHES CO., 19.

STATUTES.

1. Decrees—Statutory Proceedings—Presumption.

Where a judicial proceeding is authorized by statute and a decree or final order made in it, the presumption is that the Court meant to act under that statute, and that everything that was necessary to be done was done rightly and properly. **BROWN vs. WERTZ & CO.**, 151.

2. Interpretation—Criminal Code, Sec. 55—Gambling—Lotteries.

When the thing done is substantially that which is prohibited by statute, it falls within the same simply because, according to the true construction, it is the thing thereby prohibited.

Section 55 of the Criminal Code making it a misdemeanor to set up "any game or device of . . . hazard" where money or any valuable thing is or may or shall be "played for, or staked or betted upon" covers lotteries. **COM. vs. FREEDMAN**, 184.

3. Interpretation—Taxation—Mercantile Tax Appeal From Assessment—Subject of Levy.

The language of a taxing act is to be understood in its ordinary popular significance unless something in the context shows it to have been used in another sense.

Whilst the language of a taxing act is to be strictly construed, yet the stringency required is not altogether like that controlling the construction of penal laws, but such as to effectuate the purpose of the enactment without extending it beyond its natural meaning or so as to impose a tax by implication, or amount to an amendment of the law rather than an interpretation of it.

Exceptions allowed to a general law are liable to a restricted construction, and the party claiming the benefit of any such exception must bring himself clearly within it. *COM. vs. ATLANTIC REFINING CO.*, 158.

4. Repeal by Implication—Warehouse Receipts Act, 11 March, 1909, P. L. 19—Act 14 December, 1863, P. L. (1864) 1127.

The question of implied repeal between two statutes is always one of legislative intent. That intent is ordinarily found in a statute revising the subject-matter of earlier ones and evidently intended as a substitute for them, but it cannot be found even in such an enactment where the latter itself declares a contrary purpose.

Thus, although the Warehouse Receipts Act 11 March, 1909, P. L. 19, Sec. 33, defines the procedure and notice required in order to legalize a sale for storage charges, the proviso in Section 35 that the remedy stipulated therein shall not preclude any other remedies allowed by law for the enforcement of a lien against personal property, shows that the Legislature did not intend the Act of 1909 to repeal the Act of December 14, 1863, P. L. (1864) 1127, Sec. 2, providing a different remedy.

As exceptions strengthen the force of a general law, so enumeration weakens, as to things not enumerated. *BROWN vs. WERTZ & CO.*, 151.

SUNDAY LAW.

1. Injunctions—Sunday Baseball.

HORN et al. vs. READING BASEBALL, ETC., ASS'N et al., 239.

TAXATION.

1. County Taxes—Assessment—Machinery—Act 15 April, 1834, P. L. (1833-34) 511, Sec. 4—Act 29 April, 1844, P. L. 497, Sec. 32.

Machinery owned by A and set up in a building leased by him with the right and privilege of removing it at any time are taxable as real estate for county purposes as the property of A.

The Act 15 April, 1834, P. L. (1833-34) 511, Sec. 4, makes taxable as real estate, for county purposes, "manufactories of all descriptions," and the Act 29 April, 1844, P. L. 497, Sec. 32, subjects to such taxation "... all real estate, to wit, ... manufactories of all kinds." *BERKS CO. vs. LIEBOVITZ & SONS*, 224.

2. Mercantile Assessments—Appeal—Subject of Levy.

In an appeal from a mercantile assessment the burden is upon the appellant.

The mercantile tax is levied upon a mode of doing business and not upon the person or property.

A party, whether natural or artificial, is subject to the tax if he or it maintains a store or warehouse apart from the factory for the purpose of selling or vending goods. The license duty applies only to such dealers as are engaged in the sale of goods, or have a store or warehouse for that purpose. The mere maintenance of a warehouse apart from the factory is not sufficient to create the liability to mercantile tax where it is used for storage only and no sales are made in it or from it. *COM. vs. ATLANTIC REFINING CO.*, 158.

3. Mercantile Tax—Distributing Stations of Oil Company—Act 2 May, 1899, P. L. 184.

Where a corporation engaged in manufacturing, refining and selling petroleum and its by-products maintains, apart from its factory, distributing stations to which its manufactured products are shipped and from which they are delivered to customers by motor trucks on orders and contracts solicited by salesmen and enter through the company's factory office by which all accounts are handled and no actual sales are made immediately at the distributing stations, such stations are separate warehouses for the purpose of vending goods of the corporation, and as such subject to license tax with respect to each one of them separately. *COM. vs. ATLANTIC REFINING CO.*, 158.

VERDICTS.

1. Error in Amount—Remittitur.

FIDLER vs. FIDLER, 171.

WEAK-MINDED PERSONS.

1. Guardians—Act 28 April, 1907, P. L. 292—Act 13 June, 1836, P. L. 597.

KELLER vs. COMMERCIAL TRUST CO., *Guardian*, 127.

WILLS.

1. Bequests—Religious and Charitable Uses—Memorial Church Window—Intention of Testator—Impossibility of Carrying Out Particular Purpose—Cy pres Doctrine.

Where testatrix's general intention was to help to carry on religious work in a particular community and she sought to accomplish this general purpose by bequeathing to the church a sum of money to be used for a particular purpose, and the particular purpose proves impossible, the donor's intention to found a charity will not be frustrated when the general intention can be approximately carried out.

When a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity, for equity will substitute another mode, so that the substantial intention shall not depend upon the insufficiency of the formal intention.

A bequest for a religious use is a bequest for a charitable use. The charitable use is not destroyed by the mere fact that the motive in making the bequest was to honor the memory of an ancestor.

The test of a legal public charity is not the motive of the donor, but the object or purpose sought to be attained.

The meaning of the doctrine of cy pres is that when a definite function or duty is to be performed and it cannot be done in exact conformity with the scheme of the person or persons who provided for it, it must be performed with as near approximation to that scheme as reasonably practicable.

Testatrix bequeathed \$600 to the New Jerusalem Lutheran Church for the erection of a window in memory of her father to contain an inscription to that effect. At the death of the testatrix the church had been completed and it was impossible to erect the window without impairing the strength and beauty of the walls of the church building. **Held:** that under the doctrine of cy pres the fund will be distributed to the church for the purpose of carrying out the general charitable intention of the testatrix. *BECKER'S EST.*, 81.

2. Construction—Designation of Charity by Misnomer—Issue—“Children” Comprehending Grandchildren—Conflict of Laws—Jurisdiction.

1. Testator by will dated 1911 provided that following the death of a life beneficiary the residue of his estate should be paid in equal shares to certain charities, among which was named “The Reading Tuberculosis Society.” At the time of the testator’s death there was no society by that name, but there were two local charitable organizations for tubercular treatment: one, The Reading Sanatorium for Treatment of Tuberculosis, which had been incorporated before the will was made; the other, The Berks County Tuberculosis Society. The evidence established that until 1911, before the organization of the latter society, testator intended to give to a local tuberculosis society a share of his residuary estate, and the only society of such character in existence at the time was The Reading Sanatorium for Treatment of Tuberculosis. **Held:** that the testator’s description of the charity was sufficient to identify it as The Reading Sanatorium for Treatment of Tuberculosis.

Testator created a trust fund for his sister, Lillian, during her life and directed that upon her death the principal should be divided among certain named legatees, providing, “And should any of said legatees be deceased, without issue, at the time of sister Lillian’s death, the share of such legatee shall go to the surviving legatees, the children of deceased legatees taking their respective parents’ share.” Certain of the legatees, citizens of Massachusetts, died after the testator and before the life beneficiary. **Held:** (1) that the legatees named took a vested estate in their respective legacies subject to be divested, during the lifetime of the testator’s sister, Lillian, either by their deaths without issue, or by their deaths, leaving issue, in the latter of which events the issue took by substitution of the parents; and (2) that the domicile of the testator having been in Pennsylvania, the will having been made, and the situs of the property disposed of being in the same state, the distribution must be governed by the law of the domicile. **ALEXANDER’S EST.**, 93.

3. Construction—Heir-at-Law.

An heir is not to be disinherited except by express devise or necessary implication.

Where in the primary division of his estate the testator excludes a daughter by a special bequest “as her share,” and in the secondary division creates a trust fund for a son with remainder “to my other heirs” share and share alike, the daughter falling within the language of the gift, is entitled to participate in the distribution. **BERTOLET’S EST.**, 180.

4. Construction—Intention of Testator—Ambiguity.

In the construction of a will containing apparently contradictory provisions, the Court is obliged to keep constantly in mind the testator’s general intention, which, as opposed to minor or particular dispositions, must prevail.

The clearly expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and may justify either of two opposite interpretations. Such directions are to be so construed as to support the testator’s distinctly announced main directions.

Where a testator made a special pecuniary legacy of \$1,000 to his daughter, Ida, indicating that that is “all” she is to receive of his estate, and then distributes the residue of his estate to nine remaining children, naming them, but in a subsequent paragraph of the will directs the sale of a property and a division of the proceeds “to the legal heirs above or mentioned in my will,” the daughter Ida is limited to the legacy of \$1,000. **IRWIN’S EST.**, 111.

5. Construction of Will and Codicil—Codicil Defined—Residuary Clause Reaffirmed by Codicil.

Where a will and codicil are to be construed together, they must be regarded as parts of one and the same instrument, and the codicil is not to be allowed to vary or modify the will, unless such was the plain and manifest intention of the testator.

The codicil to a will, unless it expressly revokes the will, is but an amendment to it, and not being inconsistent with it, does not revoke it.

Wherever possible a codicil will be so construed as to give effect to all provisions of the will.

A testator, after making a number of bequests and directions, devised and bequeathed the residue of his estate "to the party or parties . . . who may be farming my farm and taking care of me at the time of my death." The codicil to the will provided "if Samuel Good now farming my farm and taking care of me remain and be with me up to and at the time of my death, that he, the said Samuel Good, shall become entitled, under my foregoing will, to the rest, residue and remainder of my estate, as therein expressed." **Held:** that the codicil did not change or revoke the residuary clause, but re-affirmed it.

The words "farming my farm and taking care of me at my death," as used in such residuary clause imposed upon the taker the duty of having tilled the land with a reasonable degree of efficiency and of having given reasonably thoughtful attention to the testator during his illness. **REINHEIMER'S EST.**, 67.

6. Designation of Devisee—Certainty.

It is not essential to the validity of a gift, either of real or personal estate, that the person who is the intended object of the testator's bounty should be actually pointed out on the face of the will. It is enough that the testator has provided the means of ascertaining it according to the maxim, *id certum est quod certum potest*.

An unnominated person in order to take under a will must answer the whole of the description or the designation by which he is mentioned in the instrument. **REINHEIMER'S EST.**, 67.

7. Devise Subject to Mortgage.

KLEMMER'S EST., 113.

8. Devisees of Real Estate cum onere—Residue Defined—Construction—Intention of Testator.

Specific devisees of real estate encumbered by mortgage cannot ask special pecuniary legatees to contribute out of their legacies to the payment of the encumbrance on the devised real estate.

The residue of a man's estate, in testamentary language means whatever is not specifically devised or bequeathed, and in whatever part of a will it may happen to be found it ought to have that meaning, unless the whole will taken together shows clearly that it was not so intended.

In construing a will, the Court seeking for the testator's intention should take into consideration his surrounding circumstances—his family, and the amount and character of his property. **KLEMMER'S EST.**, 76.

9. General and Particular Intention of Testator—Failure to Dispose of Residuary Estate.

A testator, having failed to dispose of part of a portion of his personal property by the terms of the will, it is presumed that his general intention at the time of his death was that whatever was not specifically bequeathed should be distributed under the intestate laws.

Where there is a general and a particular intent which are inconsistent, the particular is to be sacrificed to the general intent.

Testator bequeathed \$225 to his son B and stated in his will that he deemed such bequest "a full and complete distributive share for my son Benjamin and under no circumstances is my son B to receive any other part of my estate." The will failed to dispose of the residue of testator's real and personal property. **Held:** that the son B takes his share of the residue under the intestate laws. *YOCOM'S EST.*, 144.

10. Gifts—Vested Gifts.

A gift of the income of a fund without limitation as to time is a gift in perpetuity, and becomes the fund itself.

Where there is no bequest over, and no restriction to the life of the first taker, the gift is absolute.

Where a testator directs that his estate be divided into five equal shares, giving one of them to each of his four daughters "absolutely" and "to my son Milton one equal fifth part thereof," and then adds, "the four daughters above named shall each receive their share absolutely, the share given to my son Milton shall be given to the Berks County Trust Co., of Reading, Pa., for the purpose of being invested by them, the interest thereof shall be paid annually unto my son Milton, and if, at the expiration of ten years after my decease, he shall be able to demonstrate that he has accumulated, or acquired any property of value, then the principal shall be paid to him absolutely," and there is no bequest over, no restriction of the legacy to the life of Milton, and no limitation as to time, the gift to Milton is vested, and, therefore, liable for his debts. *COM.*, to use, vs. *HAGEMAN et al.*, 13.

11. Intention—Gifts.

Where it is plain that the intention of the testator was to give the entire beneficial interest of a bequest, the fact that he withheld the enjoyment of the principal until the legatee should demonstrate his ability to accumulate property, in no wise affects the question of intention. *COM.*, to use, vs. *HAGEMAN, et al.*, 13.

12. Issue to Common Pleas.

The Orphans' Court will not direct an issue to the Common Pleas to try the validity of a will where the testimony is such that, after a fair and impartial trial resulting in a verdict against the proponents of the alleged will, the trial judge, after a careful review of all the testimony, would feel constrained to set aside the verdict as contrary to the manifest weight of the evidence. On the other hand, if the state of the evidence is such that the judge would not feel constrained to set aside the verdict, the dispute should be considered substantial, and an issue to determine it should be directed. *BURBECK'S EST.*, 31.

13. Latent Ambiguity—Parol Evidence—Misdescription of Real Estate.

Where testator in making a devise misdescribes a piece of real estate, a latent ambiguity may arise making parol evidence admissible for the purpose of removing the ambiguity and giving effect to the will. Thus, where a testator devises a property described as No. 245 North Fourth street, and it appears that no such property ever existed or was owned by the testator, but that the only property owned by the testator was No. 245 North Front street, the devisee takes title to the last mentioned property. *CLAPPIER vs. FISHER*, 131.

14. Testamentary Capacity—Issue *Devisavit vel non*.

BECHTEL'S EST., 175.

15. Unnatural Will.

A will is unnatural in a legal sense only when it is contrary to what the testator from his known views, feelings and intentions would have been expected to make. When it is in accordance with such views it is never unnatural, however much it may differ from the ordinary actions of men in similar circumstances. *BURBECK'S EST.*, 31.

16. Vested Remainder.

Where a legacy is made payable at a future time, certain to arrive, and not subject to condition precedent, it is vested, where there is a person in esse at the time of the testator's death capable of taking when the time arrives, although his interest be liable to be defeated altogether by his own death.

The mere fact that the remainderman may not outlive the precedent estate, so as to come into actual possession, will not without more, render the estate contingent. *BOBST'S EST.*, 135.

17. Widow's Election to Take Against. *BOYD'S EST.*, 1.**WORDS AND PHRASES.****1. "Children."**

The word "children" does not comprehend grandchildren, or issue generally, unless: (1) utter necessity requires it, which occurs when the will would remain inoperative unless the sense of the word "children" were extended beyond its natural import; or, (2) the testator has clearly shown by other words that he did not intend to use the word "children" in the proper actual meaning, but in a more extended sense. *ALEXANDER'S EST.*, 93.

2. "Public Officer." *SHIRK vs. DIRECTORS OF POOR*, 150.**3. "To Extend."**

"To extend" means to enlarge, to expand, to increase that which already exists, and does not mean the creation of something new. The extension of a right to purchase land granted by the terms of a lease conveys the right to purchase under terms that were fixed in the lease when the right was originally granted. *OWEN'S EST.*, 86.

WORKMEN'S COMPENSATION.**1. Appeal—Finding of Fact—Interstate Commerce—Practice, C. P.**

Where on an appeal from the Workmen's Compensation Board one of the defences to the claim for payment under the Workmen's Compensation Act is that the decedent at the time he was killed was performing duties relating to Interstate Commerce and the Board in reaching its decision failed to make any finding of fact showing specifically what the decedent was doing at the time of his death, the cause will be referred back to the Board for the purpose of making such finding. *KOCH vs. PHILA. & READING RY. CO.*, 58.

2. Appeal from Referee's Decision—Findings of Fact—Practice.

A claim for payment under the Workmen's Compensation Act will, on appeal to the Common Pleas, be referred back to the referee where the findings of fact do not specifically show what the claimant was doing at the time of injury. *SAMET vs. IMBER BROS.*, 165.

3. Jurisdiction—Practice—Appeal—Refusal of Board to Grant a Hearing de novo.

On an appeal from the Workmen's Compensation Board the Court of Common Pleas has no right to re-examine the evidence before the referee or board, but is empowered to gather from the record returned on the appeal what was the basis of the findings and of the decision and to judge of its legitimacy. If based on competent evidence, direct or circumstantial, the facts found are conclusive upon the Court.

The Workmen's Compensation Act gives the Court of Common Pleas no authority to review the action of the Workmen's Compensation Board in refusing to grant a hearing de novo on the basis of after discovered evidence. **BERKS COUNTY TRUST CO. vs. READING PAPER MILLS, 156.**

Gr. C. M.
10/15/20



